Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE
UNITED STATES

DAVID PHILLIPS, STEPHAN PHILLIPS,
and CAROLYN PHILLIPS
Petitioners,

v.

RICHARD BOWLES, MICHAEL VERNA, ROBERT WESTERFIELD, BOWLES & VERNA, KEVIN REAGER, and FARMERS INSURANCE EXCHANGE
Respondents.

On Petition for Writ Of Certiorari
To The Supreme Court and Court of Appeal of the
State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. May claims of malpractice, breach of fiduciary duty, and intentional infliction of emotional distress be re-characterized as "essentially a fee dispute" to compel involuntary arbitration of these claims pursuant to an arbitration agreement that is limited to fee disputes?

II. When a party elects "not to ratify" an extorted agreement and asks the court to order arbitration, should the court deem that election a "ratification" of the extorted agreement?

III. Should the appellate court review the entire record of a libel case to determine whether the superior court has infringed upon a party's right to freedom of expression by 1) refusing to apply the litigation privilege to the party's allegations of extortion, made in the context of litigation, and the party's characterization of abuse of process as constituting "criminality" and 2) preventing that party from proving the truth of those statements?

IV. Should an extorted agreement, that the court has later forced a party to ratify, serve as the basis for a false promise claim?

V. Should an attorney who withdraws from the representation of a client prior to the completion of the terms of the retainer agreement be allowed to recover fees pursuant to a breach of contract claim, or is the attorney's recovery limited to a claim in *quantum meruit*?

VI. Are litigation costs that are necessary and reasonable to prove entitlement to contract benefits owed under an insurance policy and that would not have been incurred but for the bad faith withholding of those contract benefits recoverable as tort damages pursuant to *Brandt*?

PARTIES TO THE PROCEEDING

The Petitioners in this case are David Phillips, Stephan Phillips and Carolyn Phillips.

The Respondents are Richard Bowles, Michael Verna, Robert Westerfield, Bowles & Verna, Kevin Reager and Farmers Insurance Exchange.

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PETITION FOR WRIT OF CERTIORARI

David Phillips, Stephan Phillips and Carolyn Phillips respectfully petition for a writ of certiorari to review the judgment of the Supreme Court, Court of Appeal, and Superior Court of California in this case.

OPINIONS BELOW

The opinions of the Supreme Court (Appendix A, p. I), Court of Appeal (Appendix B, p. II and Appendix C, pp. III-XXVIII), and Superior Court of California (Appendix D, pp. XXIX-XXXI and Appendix E, pp. XXXII-XXXV) are unreported.

JURISDICTION

The Supreme Court of California denied the petition for review on October 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law... abridging the freedom of speech... or the right of the people... to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides that "No person shall be... deprived of life, liberty, or property, without due process of law..."

The Fourteenth Amendment to the United States Constitution provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

On January 25, 1996, the Phillips entered into a Retainer Contract with B&V to evaluate the Phillips's claims against their insurance carrier ("Farmers") and to advise the Phillips how best to protect their interests. (A096593 RT 22:9-10; 24:10-15; A096593 CT 38-41; 1061: ¶5.) Fees were capped at $2,500 and paid in advance. (A096593 CT 1061: ¶¶ 3&5.)

On February 13, 1996, B&V advised the Phillips to retain B&V to file suit against Farmers. (A096593 RT 26:18-28; 63:19-64:2.) Relying on B&V's advice, David entered into a second agreement with B&V, an oral fee agreement retaining B&V to sue Farmers; B&V would continue to bill at the rates previously charged under the January 1996 Retainer Contract. (A099483 RT 1220:1-9; A096593 RT 27:11-27; 285:16-287:2.) The February 1996 oral fee agreement was never reduced to writing, B&V never advised the Phillips that they had any such right, and the Phillips never signed a written waiver of that right. (A096593 RT 27:19-27.)

In order to secure B&V's fees, Mr. Bowles required the Phillips to give him personally two notes and deeds of trust: one for $250,000 secured against the Phillips's home and a second for $400,000 secured against the subject property of the insurance litigation. (A096593 RT 220:5-222:3; A096593 Exh D; A096593 CT 2954-2970.) Mr. Bowles said the notes would evidence a loan to the Phillips, the proceeds of which would be held on account with B&V to cover fees. (A096593 RT 292:16-24; A096593 CT 44: ¶4; 2954.) B&V never credited the Phillips's account. (A096593 RT 221:12-15; A099483 Exh 495:74938 & 75099.) Mr. Bowles did, however, charge interest on the loans. (A099483 CT 6050-6053; 6010.)

On August 4, 1997, B&V required the Phillips to modify, in writing, the February 1996 oral fee agreement. (A096593 CT 42-45.)

On May 21, 1998, B&V extorted yet another fee agreement from the Phillips. (A099483 CT 5885-5898; 5902-5903; A099483 Exh 219; A096593 CT 2979-2982; A096593 RT 308:28-309:24; 314:21-315:18.) The extorted May 1998 agreement replaced, rather than modified, the previous agreements and included an integration clause. (A096593 CT 50: #¶ 20; A099483 CT 73-77; 5885: ¶3; 5886: ¶¶2&4; 5982; 6066-6067: ¶1, #¶10 & #¶15; 6068-6072: #¶¶ 1-3, &12; 6072: #¶ 12; A096593 RT 300:7-15.)

On May 3, 2000, B&V withdrew from the case before completing the terms of the extorted May 1998 agreement, which required B&V to represent the Phillips through appeal. (A096593 CT 46; #¶ 2; A096593 RT 225:10-229:6; 312:27-313:9; A099483 CT 5953: ¶ 1; 5591:5-8; 5620:18-23; 6016: #¶ 4; 6020: ¶ 3; 6028: ¶ 4; 6032: ¶5; 5987: ¶3; A099483 RT 1970:22-1971:2; 1971:27-1972:14.)

B&V did not immediately file suit; a secret, internal memo shows that B&V wanted to prevent the Phillips from adjudicating their claims and so decided to wait to file until after the Phillips's statute of limitations expired. (A099483 CT 6054-6055.)

The Phillips filed before expiration of their statute. (A096593 CT 1.)

B&V filed a petition to compel arbitration, arguing 1) the extorted May 1998 agreement incorporated all earlier agreements, including the January 1996 agreement that required arbitration of "fee disputes" arising out of the January 1996 agreement and 2) all the Phillips's claims, including malpractice, breach of fiduciary duty, and intentional infliction of emotional distress were "essentially a fee dispute." (A096593 RT 12; 11-15; 33:12-17; A096593 CT 85:24-86:3; 86:14; A099483 RT 1974:12-1975:28; A099483 Exh 448.)

The Superior Court sealed the record of the evidentiary hearing on B&V's petition and ordered the Phillips to elect between 1) agreeing to binding arbitration of all issues between the parties and 2) ratifying the extorted May 1998 agreement, waiving all defenses to its formation. (A096593 RT 2:15-5:28; A096593 CT 531:21-23; 532:6-14; 606: 3-8)

The Phillips elected "not to ratify the May 21, 1998, contract" and asked the Court to "order this matter to arbitration under the January 25, 1996, contract." (A096593 CT 595:24; 596:16-17; A096593 RT 295:14-299:21.)

The Court deemed this election "not to ratify" the extorted agreement to be a ratification of the extorted agreement, waiving all defenses to formation: extortion, failure of consideration, usury, and unconscionability. (A099483 CT 468; A096593 CT 2927:4-5, Appendix C, pp. IX-XII.)

B&V refused to give the Phillips a final bill, refused to state the amount of their attorney's lien, and demanded that Farmers interplead the entire judgment from the insurance litigation. (A099483 CT 6113; 6126; 6134; 6140; 6163: ¶1.) Pursuant to the extorted May 1998 agreement, B&V limited their attorney's lien to 50% of the judgment to protect the Phillips from B&V's pattern of extortion: the Phillips predicted that without the 50% limit, B&V would encumber the entire judgment to extort an unjust settlement. (A099483 CT 5903: ¶ 3; A096593 CT 49: #¶ 19; A096593 RT 303:1-18; 319:12-19; A096593 Exh DD.) B&V circumvented this 50% limit by refusing to state the amount of their lien, and used that leverage, along with the threat of foreclosing on the Phillips's properties and the Court's forced ratification of the extorted May 1998 agreement to try to extort a settlement of this litigation from the Phillips. (A099483 CT 6160-6165; 6169-6170; 6180.)

The Phillips told B&V that their abuse of process (interpleader to evade the 50% limit) and corruption of the Court (the forced ratification of the extorted agreement) represented the most depraved form of criminality (because it destroyed the integrity of the system itself) and that the

Phillips would never give in to such extortion. (A099483 CT 6160-6165.) B&V used these statements, as well as the Phillips's statement that B&V extorted the May 1998 agreement, all made in the context of this litigation, as the basis of a libel claim against the Phillips. (Appendix C, pp. XV-XIX; Petition for Rehearing, pp. 9-13.) Because of the forced ratification, the Court ruled that 1) these statements were extraneous to the Phillips's litigation (thus not protected by litigation privilege) and 2) the Phillips could not introduce any evidence that B&V in fact extorted the May 1998 agreement (thus could not defend against libel based on the truth of the matter). (Appendix C, pp. XV-XIX; Petition for Rehearing, pp. 17-21; 6-16.)

B&V attempted to seal the record of this case. (A096593 CT 2565-2576.) The Phillips opposed B&V's motion as unconstitutional and sent copies of that motion to several news organizations so they might defend the public's constitutional rights. (A096593 CT 2584-2600; A099483 RT 1808:3-1809:10; 2016:19-2020:1.) The Court allowed B&V to use the fact that the Phillips sent a true and correct copy of B&V's own motion to news organizations as evidence of libel. (A096593 CT 2816; A099483 RT 1481:17-1486:12; A099483 Exh 493.)

REASONS FOR GRANTING THE WRIT

This case should be reviewed for two reasons: 1) the Appellate Court's decision in this case, Appendix C, creates a number of conflicts with current, published case law, and 2) those conflicts are a function of corruption, not mistake. (See Petition for Rehearing and Request for Publication, "Petition for Rehearing.")

Virtually every aspect of the Appellate Court's decision conflicts with current, published authority on point. This creates a conflict among the Appellate Courts. Review is necessary to resolve this conflict and restore consistency to the case law of this state. Additionally, because this

inconsistency is a function of corruption rather than error, review is essential. The Appellate Court refused to follow current, published authority in this case, intentionally creating conflict in the law, to cover-up the Superior Court's misconduct.

The Superior Court deprived the Phillips of a fair trial of their claims and shielded Bowles & Verna ("B&V") from being held accountable for their wrongdoing. The Phillips brought this corruption to the attention of the Appellate Court: Petition for Rehearing. This case is not about the error of the Superior and Appellate Courts, but the corruption of those Courts. This case deserves to be reviewed by the Supreme Court because the integrity of the state judiciary is the single most important institutional issue facing this Court:

> Our principal concern is always the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest possible professional standard for attorneys.

(*Alberton v. State Bar* (1984) 37 Cal.3d 1, 15; 206 Cal.Rptr. 373; 686 P.2d 1177.) This case is about attorneys defrauding their clients and getting the Courts to cover-up for them.

If the Courts are corrupted and refuse to follow the law, protecting one class of litigants at the expense of another, if litigants are thereby deprived of due process and equal protection, then the judicial system itself loses its legitimacy and individuals are free to seek self-help and private revenge. Individuals forego their right to vengeance based on a social contract that assumes the integrity of the Courts in adjudicating disputes. If this assumption is negated, then the social contract that underpins civil society is breached and individuals no longer have any obligation to obey the law. Review is essential in this case because it addresses the most fundamental, institutional issue facing this Court: the integrity and legitimacy of the Courts themselves.

B&V sought to obstruct the Phillips's claims and prevent the Phillips from gaining access to the law. B&V attempted to compel arbitration, sued the Phillips for libel for asserting the claims made in this litigation (SLAPP), moved to deem the Phillips's election "not to ratify" the extorted agreement to be a ratification of that agreement, moved to seal the record in this case, moved to have the Phillips declared vexatious litigants, and moved to have the Phillips's claims and evidence concealed from the jury based on the "ratification" of the extorted agreement. The Courts have suppressed the Phillips's claims, excluded the Phillips's evidence, and denied the Phillips's rights to due process, equal protection, and freedom of expression.

The Phillips's most basic claim was never adjudicated: that two years after initially agreeing to represent the Phillips, B&V extorted the May 1998 agreement from them by threatening to sabotage their case and foreclose on their properties if the Phillips did not acquiesce to B&V's demands. B&V won a $5.9 million judgment against the Phillips entirely predicated on that extorted agreement, without the validity of that agreement ever having been adjudicated.

B&V were allowed to assert a libel claim against the Phillips based on the Phillips's assertion, in this litigation, that B&V extorted the May 1998 agreement. Because of the forced ratification of that extorted agreement, the Superior Court excluded all evidence that B&V extorted that agreement, preventing the Phillips from arguing truth as a defense to libel. The Appellate Court refused to review the entire record in this case to determine whether the Phillips's rights to free expression were infringed.

The judgment in this case is not merely erroneous, but corrupt. The Courts know it is wrong but have affirmed it anyway.

The judgment includes contract damages based on the extorted May 1998 agreement, even though 1) the validity of that extorted agreement has never been adjudicated and 2)

B&V withdrew prior to completing the terms of that extorted agreement, limiting their recovery to *quantum meruit*.

The judgment also includes libel damages based solely on truthful, privileged statements: the Phillips said that B&V extorted the May 1998 agreement and told B&V that their efforts to corrupt the Courts as leverage to extort an unjust settlement from the Phillips represented the most depraved form of criminality (because it destroyed the legitimacy of civil society itself, based on the rule of law) and that the Phillips would never give in to this type of criminality. B&V's libel claim is based on nothing more than these statements that are truthful, privileged (because made in the context of this litigation) and protected political speech (the Phillips's opinion that an attorney's corruption of the Courts to effect injustice is the worst form of criminality because it destroys the foundation of civil society).

Finally, the judgment includes punitive damages based on this untenable libel claim and on a false promise claim also arising out of that same extorted May 1998 agreement. The judgment is insupportable. It is nothing more or less than state-assisted theft and destroys the very legitimacy of the Courts themselves. It must be corrected.

The conflict created between the Appellate Court's decision in this case and current published authority is of far-reaching and general significance. The issues involved include arbitration (can a party be compelled to arbitrate disputes that the party never agreed to arbitrate?), the litigation privilege and freedom of expression (can a libel claim be used to stifle a party's advocacy in the Courts?), due process (can a Court impute that a party has ratified an extorted agreement when that party specifically elects not to ratify that extorted agreement?), the measure of recovery for an attorney who withdraws prior to completing the retainer agreement (can an attorney recover in contract under an agreement that the attorney failed to complete, or must the attorney recover in *quantum meruit*?), and the extent of recovery allowed by *Brandt v. Superior Court* (are damages

limited to attorney's fees, or should they include any expense reasonably incurred to recover policy benefits, that would not have been incurred by for the bad faith denial of those policy benefits?).

Review should be granted in this case to preserve the integrity and legitimacy of the Courts, restore consistency to the case law of this state, and prevent the Courts, the institution charged with the protection of justice, from being co-opted into a weapon of injustice.

I. IT IS IMPROPER TO RE-CHARACTERIZE A PARTY'S CLAIMS OF MALPRACTICE, BREACH OF FIDUCIARY DUTY, AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS "ESSENTIALLY A FEE DISPUTE" TO COMPEL ARBITRATION OF THESE CLAIMS PURSUANT TO AN ARBITRATION AGREEMENT THAT IS LIMITED ONLY TO FEE DISPUTES.

The Appellate Court has created a conflict in current published case law concerning agreements to arbitrate. Current published case law only allows the Court to compel arbitration of disputes that the parties have agreed to arbitrate:

> '... arbitration is consensual in nature...'
> 'there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate....'

(*Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1505, 256 Cal.Rptr. 6.)

However, in this case, the Phillips were compelled to do exactly that: "accept arbitration of controversies which they [had] not agreed to arbitrate." The January 1996 agreement only required arbitration of "fee disputes" arising out of the January 1996 agreement. (**A096593**: CT 40: #¶9.) B&V argued that the Phillips's claims were "essentially a fee dispute." (A096593 RT 12; 11-15; 33:12-17; A096593 CT

85:24-86:3; 86:14; A099483 RT 1974:12-1975:28; A099483 Exh 448.) The Superior Court implicitly agreed, forcing the Phillips to agree to arbitrate all disputes or ratify the extorted May 1998 agreement. (A096593 CT 532:8-9.)

The Appellate Court affirmed the Superior Court's decision:

> The trial Court also properly found that the January 1996 contract's provision for arbitration of 'fee disputes' applied to the dispute between the parties...there was substantial evidence that the Phillipses' grievance with B&V, *while variously characterized*, was a dispute over the compensation due B&V. Significantly, the Phillipses' complaint was founded upon allegations that B&V incurred excessive fees and 'extort[ed]' modifications to the parties' retainer and fee agreement.

(Appendix C, pp. XI-XII, emphasis added.) The Appellate Court's sleight of hand, "*while variously characterized*," creates a direct conflict in current published case law concerning arbitration because it completely writes the consensual nature of arbitration out of the law. Allowing Courts to re-characterize a party's claims, specifically to evade the limitations imposed by the actual terms of the agreement to arbitrate, negates the consensual nature of arbitration and improperly denies litigants their right to trial.

The January 1996 agreement 1) did not require the Phillips to arbitrate fee disputes arising out of the extorted May 1998 agreement and 2) did not require the Phillips to arbitrate claims of malpractice, breach of fiduciary duty, and intentional infliction of emotional distress. The Phillips undeniably asserted various claims against B&V in addition to the fee dispute: 1) malpractice (e.g., B&V's discovery abuses prevented the Phillips from recovering costs under *Brandt*), 2) breach of fiduciary duty (e.g., B&V extorted the

May 1998 agreement by threatening to sabotage the Phillips's case in the insurance litigation and foreclose on the Phillips's properties), and 3) intentional infliction of emotional distress (e.g., Mr. Bowles harangued David, trying to force him to commit perjury to bolster an argument that B&V had asserted in the insurance litigation). (A096593 CT 14-15; 1-62; A099483 RT 661:21-663:2.)

These claims, malpractice, breach of fiduciary duty, and intentional infliction of emotional distress are not a fee dispute arising out of the January 1996 agreement, an agreement whose fees were capped at $2,500 and paid in advance. Allowing the Court such broad and absurd powers of contra-factual re-characterization negates the consensual nature of arbitration. The Appellate Court has created significant conflict in current published case law; Supreme Court review is, therefore, necessary to reestablish institutional consistency and uniformity.

Additionally, by forcing the Phillips to elect between 1) agreeing to binding arbitration of all issues between the parties and 2) ratifying the extorted May 1998 agreement, the Court improperly deprived the Phillips of their right to due process and trial of their claims. The Court only properly had the authority to require the Phillips to agree to binding arbitration of any fee dispute arising out of the January 1996 agreement, because that was the only dispute that the Phillips had agreed to arbitrate. By expanding the scope of the required arbitration, under threat of ratifying the extorted May 1998 agreement, the Phillips were deprived either 1) of their right to trial of all their claims, if they elected to agree to arbitration of all their claims, or 2) of their right to trial of their claim that B&V extorted the May 1998 agreement, if they elected not to agree to arbitration of all their claims. Either way, some substantive right was taken from the Phillips without due process. Either way, the Phillips were deprived of their right to trial: an impermissible intrusion on their constitutional rights.

The Phillips brought these issues to the attention of the Appellate Court. (Petition for Rehearing, pp. 1-5, 24-32.) These issues directly affect the entire judgment against the Phillips because that judgment is predicated on the ratification of the extorted May 1998 agreement. Contract damages, false promise, libel, and punitive damages all represent an impermissible intrusion on the Phillips's right to due process and an improper taking from the Phillips.

II. WHEN A PARTY ELECTS "NOT TO RATIFY" AN EXTORTED AGREEMENT AND ASKS THE COURT TO ORDER ARBITRATION, IT IS IMPROPER FOR THE COURT TO DEEM THAT ELECTION A "RATIFICATION" OF THE EXTORTED AGREEMENT.

An election of remedies requires "...a clearly manifested intention to pursue one of two inconsistent remedies..." (*C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664, 670.)

The Phillips elected "not to ratify the May 21, 1998, contract" and asked the Court to "order this matter to arbitration under the January 25, 1996, contract." (A096593 CT 595:24; 596:16-17; A096593 RT 295:14-299:21.)

The Superior Court held that the Phillips had thereby ratified the extorted May 1998 agreement. (A099483 CT 468; A096593 CT 2927:4-5) The Appellate Court affirmed because of the Phillips's alleged "refusal to arbitrate." (Appendix C, pp. VII-VIII.)

By construing the Phillips's election "not to ratify" the extorted May 1998 agreement as a ratification of that agreement, the Court has intruded upon the Phillips's constitutional right to due process and right to trial of their substantive claim that B&V extorted that agreement.

In refusing to give effect to the Phillips's clearly manifested intent, the Appellate Court has created a direct inconsistency in current published case law. (*C.J.A. Corp. v.*

Trans-Action Financial Corp. (2001) 86 Cal.App.4th 664, 670; Code Civ. Proc. § 1858; and by analogy to the interpretation of statutes, *Save the Sunset Strip Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172,1179.)

Supreme Court review is necessary to restore consistency to the case law of this state and to protect against the improper intrusion upon the Phillips's constitutionally protected rights.

The Phillips brought these issues to the attention of the Appellate Court. (Petition for Rehearing, pp. 1-5, 24-32.) As seen above, these issues directly affect the entire judgment against the Phillips.

III. THE APPELLATE COURT SHOULD REVIEW THE ENTIRE RECORD OF A LIBEL CASE TO DETERMINE THAT THE SUPERIOR COURT HAS INFRINGED UPON A PARTY'S RIGHT TO FREEDOM OF EXPRESSION BY 1) REFUSING TO APPLY THE LITIGATION PRIVILEGE TO THE PARTY'S ALLEGATION OF EXTORTION, MADE IN THE CONTEXT OF LITIGATION, AND THE PARTY'S CHARACTERIZATION OF ABUSE OF PROCESS AS CONSTITUTING "CRIMINALITY" AND 2) PREVENTING THE PARTY FROM PROVING THE TRUTH OF THOSE STATEMENTS.

This Court has said that the Appellate Court has a duty to review the entire record in cases involving First Amendment rights to determine if the judgment infringes upon a party's right to free expression. (*In re George T.,* (2004) Cal.4th [No. S111780, Jul. 22, 2004] (pp. 8-9); and see, *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499.) The Appellate Court failed to do that in this case, affirming a libel judgment against the Phillips based on truthful, privileged statements that the Phillips made in the context of litigation. The Court denied the Phillips the opportunity to prove the truthfulness of their statements. The libel judgment

represents an impermissible intrusion upon the Phillips's right of free expression.

Additionally, in finding that the Phillips's statements were not protected by litigation privilege, the Appellate Court created a conflict between its decision and current published authority.

The Appellate Court asserts: "...the Phillipses were free to present evidence of coercion or exploitation to support their defamation defense..." (Appendix C, pp. XVIII-XIX.) That is false. (Petition for Rehearing, pp. 17-24.)

The Superior Court allowed the Phillips to explain that "extortion" meant "coercion" only as a defense to malice, not as a defense to libel. (A099483 RT 1855:2-10.) The Superior Court prevented the jury from considering any definition of "extortion" other than the criminal code and held that the Phillips could not satisfy that definition as a matter of law because of their ratification of the extorted May 1998 agreement. (A099483 RT 1827:16-1828:2.) The Superior Court prevented the Phillips from proving that the May 1998 agreement was extorted. (A099483 CT 4858-4861; A099483 RT 337:12-338:25; 1659:4-1665:6.) The Superior Court redacted the exhibits used to support B&V's libel claim to prevent the Phillips from explaining the context and truthfulness of those statements. (A099483 RT 1854:7-1855:10.) Preventing the Phillips from proving the truth of their statements allowed an improper judgment for libel to be entered against them, infringing their right to free expression.

In finding that the Phillips's statements were not privileged, the Appellate Court has also created conflict with current published authority. The Appellate Court found that the privilege did not apply because 1) in order to rescind the extorted May 1998 agreement, the Phillips only needed to claim coercion, not extortion, and so the claim of extortion was extraneous to the Phillips's litigation objective and 2) the Phillips's allegations "...of 'criminal conspiracy' and 'criminality' were extraneous to the Phillipses' efforts at

contract rescission and thus outside the scope of the litigation privilege." (Appendix C, pp. XVI-XVIII.)

First, the distinction between "extortion" and "coercion" is nonsensical. Extortion means the taking of something through coercion. The Phillips have a right to allege the true facts of their case: B&V extorted the May 1998 agreement. It is irrelevant that the Phillips could have chosen the word "coerced" rather than "extorted" in seeking rescission.

Second, in denying litigation privilege on the ground that the Phillips's statements concerning "criminality" were extraneous to contract rescission, the Appellate Court failed to consider the full array of the Phillips's claims and objectives in litigation. The Phillips asserted claims based on B&V's tortious misconduct: breach of fiduciary duty, intentional infliction of emotional distress, and abuse of process. (A096593 CT 1-62; A099483 CT 2881-2902) To prevent interpleader and keep B&V from encumbering 100% of the Phillips's judgment to extort unjust settlement, the Phillips tried to compel B&V to provide a final bill and state the amount of their attorneys' lien. (A099483 CT 568-575; 1934-1947; 6126-6127; A096356 CT 123-163; 440-463.)

The Phillips not only claimed that B&V extorted the May 1998 agreement, but also obtained both notes and deeds of trust through fraud, extorted the August 1997 agreement, improperly encumbered 100% of the Phillips's judgment as leverage to extort a settlement of this litigation, threatened to foreclose the deeds of trust to extort the May 1998 agreement and an unjust settlement of this litigation, and engaged in litigation misconduct to extort settlement and oppress the Phillips. (A099483 CT 5903: ¶3; 568-575; 1934-1947; 2183-2193; 6114-6115; 6123-6129; 6134; 6136-6137; 6141-6142; 6143-6144; 6153-6154; A099483RT 322:5-325:6; A096593 CT 650; 2585-2599; A100270 CT 1981:25-1982:3.)

The Phillips asserted that all these complained-of acts constituted "fraud, extortion, and criminal conspiracy," a continuing "...pattern of extortion and wrongdoing," In order to resist B&V's abuse and attempts to oppress and extort an

unjust settlement of the Phillips's claims in this litigation, the Phillips wanted to make it perfectly clear that they "...will never give in to this type of criminality."

These statements relate to the Phillips's claims and are aimed at the object of litigation: to resist B&V's misconduct, defend against extortion, be made whole for the damage caused by B&V, and prevent B&V from continuing this pattern of misconduct. While these statements may be deemed extraneous to contract rescission, they are central to Phillips's claims of breach of fiduciary duty, intentional infliction of emotional distress, abuse of process, and opposition to interpleader. The Phillips had proper litigation objectives in asserting these claims: resisting B&V's misuse of interpleader to encumber 100% of the judgment and extort an unjust settlement.

The letters cited by the Appellate Court were specifically written to defeat the filing of the interpleader action, compel B&V to state the amount of their bill, pay B&V any amounts legitimately owed, and refuse to submit to the extortion of an unjust settlement.

The May 3, 2001 letter cited by the Appellate Court was written in response to two letters from Mr. Bowles to Mr. Kennedy demanding that Mr. Kennedy interplead 100% of the Phillips's judgment, even though the Phillips had already instructed Mr. Kennedy to pay $1,430,271.45 from that judgment directly to B&V. (A099483 CT 6126; 6140.) The statement cited by the Appellate Court to support denial of litigation privilege is specifically directed at preventing interpleader and dissuading B&V from misusing that equitable relief to encumber 100% of the judgment as leverage to extort an unjust settlement. The Phillips directed B&V's attention to relevant legal authority to dissuade B&V from engaging in that misconduct. The May 3, 2001 letter reads:

> I have, however, received copies of Mr. Bowles's recent letters to Mr. Kennedy. After checking with the court, it appears Mr.

> Bowles misinformed Mr. Kennedy regarding our proceedings.
> Mr. Bowles makes it quite clear that ***Bowles & Verna is resolute in continuing its pattern of extortion and wrongdoing***. I direct your attention to *McGrath v. State Bar* 21 C.2d 737, 741; *Lindenbaum v. State Bar* 26 C.2d 565, 573; 91 A.L.R.3d 583; 7 Am.Jur.2d Attorneys at Law §55.
> ...
>
> While this appears no longer to be your concern, with final payment of $1,430,271.45 to Bowles & Verna from Farmers, my clients believe that the fee issues between the parties have been entirely resolved. If Bowles & Verna feels differently, it ought to contact me directly to discuss this matter. My clients are happy to consider any supplemental billings which Bowles & Verna may have so far neglected to provide to my clients. My clients are also happy to consider any other issues that Bowles & Verna may wish to raise regarding fees and costs, including both mediation and arbitration.

(A099483 Exh 469; A099483 CT 6147-6148; emphasis added to highlight the basis for libel.) The Phillips did not libel B&V, but complained about specific misconduct and directed B&V to legal authority to demonstrate that misconduct. These statements were not extraneous, but central to the Phillips's litigation claims and objectives: preventing interpleader, securing a final bill from B&V, and paying amounts legitimately owed.

The May 8, 2001 letter reads:

Let me be very specific. First, the "precondition" to which you refer is that Bowles & Verna obey the law. As long as your clients persist in their attempts at ***fraud, extortion, and criminal conspiracy***, this case will never settle. Second, the agreement you sent to me does not represent any agreement between the parties. Indeed, there has never been any finalized settlement agreement between the parties. My clients have, however, tried very hard to reach such an agreement and have provided you in their letter of May 4, 2001, with a way to revise your draft so that it would represent a true, finalized settlement agreement. Third, both you and your clients made specific misrepresentations to my clients in your efforts to defraud a settlement from my clients and then much later you specifically refused to include those misrepresentations in the written settlement agreement.

The hourly legal fees and costs charged by your clients were not $2.1 million, but rather $1.53 million. If you believe the amount is higher, please provide us with the evidence of that fact and we will happily increase the payment. My clients have always been willing, indeed eager, to pay Bowles & Verna the full amount of its hourly legal fees and costs in accordance with the original agreement, even though Bowles & Verna has repeatedly breached that agreement, padded its bill significantly, provided incompetent and negligent services, and has therefore given my clients a number of offsets and

defenses to the bill. My clients have nevertheless instructed Farmers to pay your clients the full amount of their hourly legal fees and costs directly from the judgment. By doing this, my clients do not waive any of their defenses to your clients' billing or any of their claims against your clients should your clients force this matter into litigation. My clients are merely upholding their part of the bargain, and giving your clients every benefit of the doubt. My clients will certainly seek refund, however, should they be forced into further litigation.

My clients have repeatedly asked your clients to provide a definitive statement of the total amount of hourly legal fees and costs incurred in the Farmers litigation. My clients have repeated asked your clients to provide a final, total billing. Your clients have repeatedly refused. Instead, you have asserted that my clients will have to find out the amount of their bill from your clients through formal litigation discovery. This is outrageous. Your clients insist on concealing the amount of the bill. Why is it, we wonder, that your clients refuse simply to state the amount of their actual bill for hourly legal fees and costs. Surely they know the amount of their own bill. They have done no work on this matter for more than two years. They had to submit that bill to the court more than two years ago and they had to testify under oath about that bill. The only possible answer is that your clients are again up to their old tricks of trying to collect more than they are actually owed

through fraud and extortion. My clients ***will never give in to this type of criminality***. To allow Bowles & Verna to get by with such a crime would be immoral. The true amount of that bill is what your clients testified it was under oath over two years ago: $1.53 million. Therefore, my clients' previous payments, plus final payment of $1,430,271.45 directly from the judgment, represents full and final payment of the bill and extinguishes any debt owed by my clients to your clients.

As of the date of your letter, May 7, 2001, you were in receipt of my confidential letter May 4, 2001. That letter had to be confidential because of the agreements that you required. You assert that I refused to review the draft of your proposed settlement agreement. While I had previously refused to review that agreement as a way of putting your clients on notice that their criminal efforts to extort further concessions from my clients by wrongfully encumbering the entire amount of their judgment would be useless and ineffective, by the date of your May 7, 2001, letter, because of my May 4, 2001, letter, you knew your allegation concerning review of the draft to be a lie. Lying is not going to get you anywhere. I hope you stop.

(A099483 Exh 473; A099483 CT 6162-6163, emphasis added to highlight the basis for libel.) These letters, and the charges made therein, are not extraneous to the Phillips's claims and objectives, but central to them: to obtain a final bill, to pay the correct amount of fees, to prevent B&V from trespassing on the equitable relief of interpleader, and to resist B&V's

attempts to extort an unjust settlement, payment in excess of legitimate fees under threat of encumbering 100% of the Phillips's judgment.

Before agreeing to the extorted May 1998 agreement, based on their experience with B&V's past extortion, the Phillips predicted that B&V, if given the chance, would encumber 100% of the judgment and use that leverage to extort from the Phillips. (A099483 CT 5903, ¶3.) B&V limited their lien to 50% of the judgment in order to protect the Phillips from that threat of extortion. (A096593 CT 49: #¶ 19; A099483 CT 5987.)

And yet, when it came time for Farmers to pay the judgment, B&V refused to state the amount of their lien, precipitated interpleader, encumbered 100% of the judgment, and attempted to use that leverage to extort an unjust settlement. (A100270 CT 1981:25-1982:3.) The letters cited by the Appellate Court to deny privilege were written 1) to show that B&V were using interpleader as a weapon for extortion, 2) that this type of misconduct was part of a pattern of extortion and wrongdoing that the Phillips had suffered at the hands of B&V, and 3) that the Phillips would never give in to this type of criminality. (A099483 CT 6114-6115; 6123-6125; 6128-6129; 6134; 6136-6137; 6141-6142; 6143-6144; 6153-6154; 6227.)

These statements, cited by the Appellate Court, were aimed at the objective of litigation, written within the context of litigation, protected by the litigation privilege, and true. (Petition for Rehearing, pp. 6-16.)

This Court has held that to be privileged, the communication need only bear some logical connection to the litigation. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 219-220; 266 Cal. Rptr. 638.) The Appellate Court has held that the privilege should be read expansively and that any doubt should be resolved in favor of applying the privilege. (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529; 3 Cal.Rptr.2d 49.) The communication only needs to bear "some relation" to the anticipated litigation in order to be

privileged. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194-1195; 17 Cal.Rptr.2d 828) The Appellate Court has applied the privilege to include allegations of criminal misconduct. (*Passman v. Torkan* (1995) 34 Cal.App.4th 607, 614-616; 40 Cal. Rptr.2d 291.) The privilege is intended to apply in cases such as this to encourage attorneys zealously to protect the interests of their clients. (*Home Insurance Co. v. Zurich Insurance Co.* (2002) 96 Cal.App.4th 17, 23-24; 116 Cal.Rptr.2d 583.)

The Appellate Court only considered one of the Phillips's claims in determining that these statements were extraneous to the objective of litigation. Had the Appellate Court reviewed the entire record and considered the other claims asserted by the Phillips (breach of fiduciary duty, intentional infliction of emotional distress, and abuse of process) and the Phillips's other litigation objectives (to defeat interpleader and resist B&V's attempt to extort an unjust settlement) then it would have been clear that these statements were not extraneous, but central and essential to the Phillips's claims and objectives in litigation.

Additionally, the Phillips made no factual allegation of there being any criminal record or conviction. The Phillips only characterized B&V's conduct as criminal: a constitutionally protected assertion of opinion.

The Appellate Court's reliance on *Nguyen v. Proton Technology* is misplaced. *Nguyen v. Proton Technology* is clearly distinguishable. In *Nguyen*, the claim of criminal misconduct was unrelated to the civil case: wife-beating or firearm use in the context unfair competition. (*Nguyen v. Proton Technology* (1999) 69 Cal.App.4th 140, 151.) The claim related to the use of criminal records. (*Id.* at p. 152.) The assertion was made as a statement of fact, there having been an unrelated, criminal conviction.

The Phillips made no factual claim of there being a criminal record or conviction, but merely characterized their own experience of B&V's treatment of them. The Phillips have a constitutionally protected right to free expression

entitling them not to claim that B&V have a criminal record but to characterize their experience of the abuse they suffered at the hands of B&V: B&V misused the judicial system to steal a $5.9 million judgment, corrupted the judicial system to retain $4.9 million of that unjust judgment, and B& breached their fiduciary duty to the Phillips. The Phillips believe this type of systemic misconduct constitutes the most depraved form of criminality because it strikes at the very integrity of the system itself. The Phillips believe B&V co-opted the institutions of justice into a weapon of injustice. This is the Phillips's opinion and they have a constitutionally protected right to assert it. The Appellate Court wrongfully abrogated that right.

The Appellate Court failed to make the required independent examination of the record. For purposes of such an examination, the issue of the forced ratification of the extorted May 1998 agreement is irrelevant. As a consequence of that erroneous, forced ratification, all facts relating to B&V's extortion of the May 1998 agreement, taking and use of notes and deeds of trust (threatening to foreclose on the Phillips's property if the Phillips did not acquiesce to B&V's demands), refusal to state the amount of their lien to encumber 100% of the Phillips's judgment and extort an unjust settlement, and abuse of process to deny the Phillips a fair trial of the Phillips's claims (petition to compel arbitration, election, motion to seal record, and vexatious litigants) were all concealed from the jury. The Appellate Court, however, should have considered these facts in conducting its independent examination of the record to determine if the Phillips's constitutional right of free expression had been infringed.

The judgment in this action constitutes a forbidden intrusion on the Phillips's right of free expression and directly conflicts with current published authority. Supreme Court review is necessary to restore institutional consistency and preserve the integrity of the system.

IV. AN EXTORTED AGREEMENT, THAT THE COURT HAS LATER FORCED A PARTY TO RATIFY, MAY NOT SERVE AS THE BASIS FOR A FALSE PROMISE CLAIM.

In affirming the false promise judgment, the Appellate Court created a direct conflict with current published authority.

The elements of false promise are: 1) a valid promise, 2) freely given, 3) without the intent to perform, 4) in order to induce another a) to rely on that promise and b) to act or refrain from acting based on that promise, 5) that person must act or refrain from acting, 6) in reliance on that promise, 7) that the reliance be reasonable, and 8) that the person suffer damage proximately caused by the false promise. (*Lazar v. Superior Court (Rykoff-Sexton, Inc.)* (1996) 12 Cal.4th 631, 638; 49 Cal.Rptr.2d 377; 909 P.2d 981.) (A099483 RT 2121; 1-16.)

In this case, B&V extorted the May 1998 agreement. (A099483 CT 5885-5898; 5902-5903; A099483 Exh 219; A096593 CT 2979-2982; A096593 RT 308:28-309:24; 314:21-315:18.) That promise is not, therefore, valid. However, the Appellate Court erroneously affirmed the Superior Court's holding that the Phillips ratified that agreement, rendering it valid. The Appellate Court cut off its analysis there, satisfied that false promise was therefore tenable. (Appendix C, pp. XIX-XX.)

The Appellate Court's analysis is incomplete. While the Appellate Court's erroneous affirmation of the ratification of the extorted agreement satisfies the requirement of there being a valid promise (if erroneously) it does not satisfy the requirements that the promise be 1) freely given and 2) that B&V's reliance on that promise be reasonable.

B&V extorted the May 1998 agreement from the Phillips. Therefore, that promise was not freely given, it was extorted, and B&V's reliance on that promise, a promise that they knew that they had extorted, was not reasonable. B&V knew

that the Phillips did not willingly accept the extorted agreement and that the Phillips did not freely give that promise. (A099483 CT 5885-5898; A099483 RT 1530:17-1532:19; 2007:12-2009:14; A099483 Exh 187.)

The later ratification of the extorted May 1998 agreement does not obviate these obstacles to recovery for false promise. Ratification would render the invalid promise valid, but it would not render that promise freely given or reliance on that promise reasonable. Ratification only excuses extortion, retroactively, preventing the Phillips from raising extortion as a defense to the contract, but it does not revise history and erase the fact that at the time that B&V extorted the May 1998 agreement, that agreement was extorted from, not freely given by, the Phillips, and B&V's reliance on a promise that B&V had extorted was not reasonable.

Allowing false promise in this case should not be allowed because it undermines the strong policy that a client has a right to discharge an attorney at will. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790-792; 100 Cal.Rptr. 385; 494 P.2d 9.) When an attorney withdraws or is discharged prior to the completion of the contract, the attorney recovers in *quantum meruit*, not false promise. Threat of false promise lurking behind every client's discharge of an attorney would inhibit the client's exercise this right and undermine the policy.

By cutting off its analysis without considering the full range of issues involved in false promise, the Appellate Court has created two direct conflicts with current published authority: 1) the Appellate Court has said that a valid promise is sufficient for false promise, eliminating the need for that promise to have been freely given and for reliance on that promise to have been reasonable and 2) the Appellate Court has eroded the client's right to discharge an attorney at will by making the client potentially subject to a false promise claim based on that discharge. Supreme Court review is necessary to bring consistency back to the case law of this state.

The Phillips brought these issues to the attention of the Appellate Court. (Petition for Rehearing, pp. 37 & 42.)

V. AN ATTORNEY WHO WITHDRAWS FROM REPRESENTATION OF A CLIENT PRIOR TO COMPLETING OF THE TERMS OF THE RETAINER AGREEMENT MAY NOT RECOVER FEES PURSUANT TO BREACH OF CONTRACT, BUT MUST BE LIMITED TO RECOVER IN *QUANTUM MERUIT.*

The Appellate Court has created a direct conflict in current published authority by allowing a law firm, B&V, to recover in breach of contract on a retainer agreement that B&V did not complete. Current published authority, other than the decision in this case, limits the attorney's recovery to *quantum meruit.* Supreme Court review is necessary to restore institutional consistency to the case law of this state.

B&V did not complete performance of the extorted May 1998 agreement: B&V withdrew on May 3, 2000, prior to handling the appeal in the insurance litigation as required by the extorted May 1998 agreement.

Because B&V withdrew prior to completing the May 1998 agreement, B&V can only recover in *quantum meruit.* (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 792; 100 Cal.Rptr. 385; 494 P.2d 9; And see 56 A.L.R.5th 1.)

This analysis is not affected by the Appellate Court's erroneous holding that the Phillips ratified the extorted May 1998 agreement. The Superior Court held that ratification only rendered the extorted agreement valid in its formation, foreclosing defenses based on formation, but not foreclosing defenses based on performance. (A096593 CT 527:12-13.) B&V's withdrawal prior to completing performance of the extorted May 1998 agreement is not an issue of formation but rather an issue of performance: it is not foreclosed by the erroneous ratification of the extorted agreement.

The rule preventing an attorney who fails to complete a retainer agreement from recovering fees in breach of contract pursuant to that agreement, allowing recovery only in *quantum meruit*, applies to all valid attorney-client retainer agreements. Likewise, it applies here. The Phillips brought this issue to the attention of the Appellate Court. (Petition for Rehearing, pp. 5-6.)

Supreme Court review is necessary to restore institutional consistency. Is an attorney who withdraws prior to completing the retainer agreement allowed to recover in breach of contract or is that attorney limited to the quasi-contractual recovery of *quantum meruit*? This issue is of general importance because it potentially affects every attorney-client relationship. The Appellate Court's decision in this case would improperly infringe upon the policy protecting a client's right to discharge an attorney. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790-792.)

VI. LITIGATION COSTS THAT ARE NECESSARY AND REASONABLE TO PROVE ENTITLEMENT TO CONTRACT BENEFITS OWED UNDER AN INSURANCE POLICY AND THAT WOULD NOT HAVE BEEN INCURRED BUT FOR THE BAD FAITH WITHHOLDING OF THOSE CONTRACT BENEFITS ARE RECOVERABLE AS TORT DAMAGES PURSUANT TO *BRANDT*.

This Court has held that when an insurance company wrongfully withholds policy benefits, an insured should be made whole for having to prove entitlement to those benefits. (*Brandt v. Superior Court (Standard Ins.)* (1985) 37 Cal.3d 813, 817; 210 Cal.Rptr. 211.)

Brandt allows recovery of attorney's fees that are incurred to establish entitlement to policy benefits. The analysis underlying *Brandt* applies not only to attorney's fees, but also to any cost of litigation that satisfies the underlying rationale of *Brandt*: any cost necessary and reasonable to establish

entitlement to policy benefits that would not have been incurred but for the bad faith denial of policy benefits. (*Orrick Herrington & Sutcliffe v. Superior Court* (Malcolm) (2003) 107 Cal.App.4th 1052, 1059.)

Some such costs are separately recoverable pursuant to Code of Civil Procedure section 1032. No double recovery is allowed. However, some such costs are not recoverable under that code section. Just as *Brandt* allows the recovery of attorney's fees that would be otherwise unrecoverable, *Brandt* allows the recovery of costs, not separately recoverable under Code of Civil Procedure section 1032, that are necessary and reasonable to establish entitlement to policy benefits and that would not be incurred but for the bad faith denial of policy benefits.

In its decision in this case, the Appellate Court holds that costs are not recoverable pursuant to *Brandt* and asserts that no published authority applies *Brandt* to the recovery of costs:

> There is no authority for the Phillipses' claim that Brandt permits recovery of all expenses incurred in prosecuting an action to recover policy benefits, even if the expenses fall outside the statutory definition of 'costs' under Code of Civil Procedure section 1032.

(Appendix C, pp. XXI-XXII.) While no published decision appears to focus on there being a relevant distinction between fees and costs, extending the analysis specifically to costs, most courts award costs and hold that costs are recoverable pursuant to *Brandt*: referring to "attorney fees and costs." (*Jonathan Neil & Assoc., Inc. v. Jones* (2004), Cal.4th [No. S107855. Aug. 5, 2004.] {Slip Opn. p. 12}; *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1045; *Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928, 948.)

As such, there is institutional inconsistency in the Courts. Many Courts properly award such costs. Other Courts, as

here, erroneously refuse to award such costs. (Appendix C, pp. XXI-XXII.)

Supreme Court review is necessary to bring consistency to the Courts of this state. This issue affects every litigant who prevails in an insurance bad faith case. All such litigants should be treated the same: the Courts should consistently award recovery pursuant to *Brandt* to all such litigants in precisely the same way. Currently, that does not happen.

CONCLUSION

The Appellate Court's decision in this case creates several conflicts with current published authority. Supreme Court review is necessary to restore consistency.

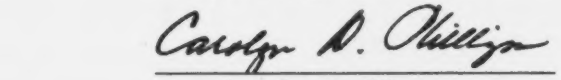
The Courts have improperly infringed the Phillips's constitutional rights to due process, equal protection, and freedom of expression.

Finally, because the Appellate Court's decision in this case is not merely erroneous, but corrupt, intentionally refusing to follow the law in order to affirm an unjust judgment against the Phillips that amounts to nothing short of state sponsored theft, Supreme Court review is *necessary* to preserve the integrity and legitimacy of the Courts themselves. This is the most important institutional issue that the Supreme Court can address.

David, Stephan, and Carolyn Phillips respectfully request that the Supreme Court of the United States review the Appellate Court's decision affirming the judgment against the Phillips in this action.

Date: January 28, 2004

Respectfully submitted,



Carolyn D. Phillips
Attorney for Petitioners

APPENDIX

APPENDIX A:
SUPREME COURT OF CALIFORNIA
DENIAL OF PETITION FOR REVIEW
AND DENIAL OF REQUEST FOR AN
ORDER DIRECTING PUBLICATION
OF THE OPINION I

APPENDIX B:
COURT OF APPEAL DENIAL OF PETITION
FOR REHEARING AND DENIAL OF
REQUEST FOR PUBLICATION II

APPENDIX C:
COURT OF APPEAL OPINION AND ORDER
MODIFYING, AFFIRMING, AND REVERSING
OPINION III

APPENDIX D:
SUPERIOR COURT ORDER SETTING
REASONABLE ATTORNEY'S FEES XXIX

APPENDIX E:
SUPERIOR COURT JUDGMENT IN FAVOR
OF RICHARD BOWLES, MICHAEL VERNA,
ROBERT WESTERFIELD AND BOWLES &
VERNA XXXII

Court of Appeal, First Appellate District, Division Four
Nos. A099483/A099484/A099770/A100270

IN THE
SUPREME COURT OF CALIFORNIA

En Banc

DAVID PHILLIPS et al.,
Plaintiffs and Appellants,

v.

RICHARD BOWLES et al.,
Defendants and Respondents.
And CONSOLIDATED CASES.

Petition for review DENIED.
The request for an order directing publication of the opinion is denied.

SUPREME COURT
FILED OCT. 13, 2004
Frederick K. Ohlrich, Clerk
Deputy

s/ George
Chief Justice

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 4

DAVID PHILLIPS et al.,
Plaintiffs and Appellants,
v.

RICHAD BOWLES et al.,
Defendants and Respondents.

FILED
AUG 05, 2004
Court of Appeal
First App. Dist.
By DIANA
HERBERT,
Deputy

A099483, A099484, A099770, A100270
Contra Costa County No. C0001529

BY THE COURT:

The petition for rehearing is denied.

The request for publication is denied.

Date: August 05, 2004

s/ Kay, P.J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

DAVID PHILLIPS et al., Plaintiffs and Appellants, v. RICHARD BOWLES, et al., Defendants and Respondents.	A099483, A099484, A099770 (Contra Costa County Super. Ct. No. C00-01529)
FARMERS INSURANCE EXCHANGE et al., Plaintiffs and Respondents, v. DAVID PHILLIPS et al., Defendants and Appellants; RICHARD BOWLES et al., Defendants and Respondents.	A100270 (Contra Costa County Super. Ct. No. C01-01770) FILED JUL 09 2004 Court of Appeal First App. Dist. By DIANA HERBERT Deputy

Litigants obtained a $7 million verdict in insurance litigation and then sued the attorneys who had represented them, claiming that the attorneys committed malpractice by failing to recover a greater amount of damages and by imposing excessive fees. The attorneys cross-complained to recover their fees and prevailed at trial. We modify the judgment to remove fraud damages of $466,752 and contractual attorney fees of $972,250 but otherwise affirm the judgment awarding damages totaling $4,459,260.

In a separate interpleader action, the insurer deposited the full amount of the judgment from the insurance litigation for adjudication of the conflicting claims to the proceeds made by the litigants and their attorneys. We affirm the court's order apportioning and releasing those funds to the litigants and their attorneys.

FACTS

The Bowles & Verna law firm represented David and Stephan Phillips (the Phillipses) in a lawsuit brought against the Phillipses' insurer for failure to pay benefits under a residential fire insurance policy. The Phillipses prevailed at trial and we affirmed a $7 million judgment in their favor. (*Phillips v. Fire Insurance Exchange* (March 14, 2001, A087049) [nonpub. opn.].)

On April 21, 2000, the Phillipses sued the Bowles & Verna law firm (B & V, or firm); firm partners Richard Bowles, Michael Verna, and Robert Westerfield; firm associate Kevin Reager; and First American Title Insurance Company. The central allegations of the Phillipses' complaint are that the B & V law firm and its attorneys committed malpractice by incurring excessive fees and failing to recover a greater amount of damages from plaintiffs' insurance carrier, and by "extort[ing]" modifications to the parties' retainer and fee agreement through threats to withdraw from legal representation during the insurance case.

The Phillipses alleged legal malpractice, fraud, breach of fiduciary duty, infliction of emotional distress, and breach of contract against the firm and its attorneys. The Phillipses also sought to quiet title and to recover damages against Attorney Bowles, as beneficiary, and First American Title Insurance Company, as trustee, on promissory notes for attorney fees secured by trust deeds and allegedly obtained through "duress, menace and fraud," The Phillipses asked for $40 million in damages and rescission of attorney fee agreements, among of remedies.

The Phillipses maintained that the operative fee agreement was an oral contract from March 1996, which estimated total attorney fees in the insurance lawsuit at only $60,000. The Phillipses acknowledged the existence of an original written fee agreement of January 1996, a written modification of August 1997, and a written agreement of May 1998. However, the Phillipses' complaint suggested that the original written agreement was superseded by the alleged oral agreement, as seen in the Phillipses' allegation that a March 1996 oral agreement adopted the same hourly rates as those stated in the "previous retainer agreement" of January 1996. The Phillipses alleged that the August 1997 modification and May 1998 agreements were invalid because they had been procured by "duress, menace, and fraud."

B & V and its individually sued attorneys (collectively, B & V) petitioned to compel arbitration on May 22, 2000. B & V maintained that the operative agreement was the January 1996 retainer agreement and its written modifications of August 1997 and May 1998, which were allegedly necessitated by the Phillipses' failure to pay overdue attorneys fees. The January 1996 agreement provides that "[a]ll fee disputes shall be submitted to binding arbitration." B & V argued that the central dispute between the parties was a fee dispute, and that the Phillipses' allegations of malpractice were a façade erected to avoid payment of fees.

The trial court permitted the parties to conduct discovery to gather evidence on the disputed factual issue of which retainer and fee agreement was in force, as resolution of that fact would impact whether arbitration should be compelled under the January 1996 agreement. An evidentiary hearing was conducted in September 2000, before Judge Flinn, and B &V's motion to compel arbitration was taken under submission.

The court issued its decision in December 2000. The court questioned the Phillipses' position that a Mach 1996 oral agreement (without an arbitration provision) was binding, but also expressed doubt with B & V's position that the January 1996 written agreement (with an arbitration provision), modified in August 1997 and May 1998, was binding. The court observed that the May 1998 document contained an integration clause stating that it was the exclusive agreement between the parties, and thus appeared to supersede the January 1996 agreement rather than modify it, contrary to B & V's argument. The court suggested that its choice lay between finding that the January 1996 agreement was binding under which arbitration must be compelled, or finding that the May 1998 agreement was binding, under which arbitration could not be compelled.

However, the court noted that it faced an "interesting situation" in that the party opposing arbitration nevertheless would not affirm the contract precluding arbitration. The Phillipses insisted that the May 1998 agreement, which lacked an arbitration clause, was not binding because it was procured by duress and fraud. The court found that the Phillipses wanted to rely upon the May 1998 contract to prevent arbitration, but also inconsistently wanted to void the contract. The court concluded that the Phillipses "cannot have it both ways. An election must be made." The court gave the Phillipses an opportunity to make a knowing election: "[The Phillipses] are therefore given until January 31, 2001, to agree to binding arbitration of the issues between the parties. If they do not so elect the court will deem their

action to be a ratification of the May 21, 1998 agreement and defenses that the agreement is void, for duress, fraud, failure of consideration, or any other reason, will be deemed waived."

The Phillipses submitted a document entitled "Election," but the Phillipses refused to elect between the stated choices and instead attacked the court's ruling as "absurd," "idiotic," and "asinine," and the court's conduct as "biased," "disgraceful," and "unlawful." The Phillipses also simultaneously filed a motion to disqualify Judge Flinn as biased. (Code of Civil Proc., § 170.3, subd. (c).) The disqualification motion was heard and denied by Judge Spinetta in March 2001.

The Phillipses then filed a first amended complaint in April 2001 with causes of action for legal malpractice and infliction of emotional distress alone, in an effort to eliminate the fee dispute aspect of their case that had supported the order compelling arbitration. A cross-complaint was filed in May 2001 by the Bowles & Verna law firm, Verna, Bowles, and Westerfield against David and Stephan Phillips and their mother and attorney Carolyn Phillips. B & V sued for breach of the May 1998 fee agreement, libel, and other wrongs, and claimed that it had provided legal services valued at over $4 million.

Carolyn Phillips, as a newly joined party to the litigation, lodged a peremptory challenge to Judge Flinn in June 2001. (Code of Civil Proc., § 170.6.) The court later accepted the challenge and the case was reassigned to Judge Kolin. Meanwhile, the day after challenging Judge Flinn, the Phillipses (David, Stephan and Carolyn) filed a "Supplemental Election" stating that the Phillipses had amended their complaint "so as to drop all contract or fee dispute claims, and related claims, thereby insuring that they would receive no benefit whatsoever from the extorted May 21, 1998 agreement," to which they continued to assert defenses. Despite Judge Flinn's earlier ruling that the May 1998 agreement would be deemed ratified f the Phillipses did

not agree to arbitration, the Phillipses insisted that their refusal to arbitrate should not waive their contract defenses. The Phillipses filed a motion to vacate Judge Flinn's December 2000 ruling.

In October 2001, the court, Judge Kolin presiding, denied the Phillipses' motion to vacate the December 2000 ruling, and issued an order upon that ruling denying B & V's motion to compel arbitration. The court found that the Phillipses "are deemed to have ratified the May 1998 agreement by failing to consent to binding arbitration." In November 2001, the court granted B & V's motion for summary adjudication on their cross-complaint's breach of contract cause of action. The court found that David and Stephan Phillips ratified the May 21, 1998 agreement and thus waived their rights to argue that the agreement is void as a result of duress, fraud, failure of consideration, or any other reason.

Trial commenced on April 15, 2002, before Judge Bruiniers. Judgments were entered on the jury's special verdict in favor of the B & V law firm and Attorneys Bowles, Verna, and Westerfield on May 14, 2002, and in favor of Attorney Reager on May 17, 2002. The jury rejected the Phillipses' claims that the firm and its attorneys unjustifiably breached the retention agreement, misrepresented the cost of litigation, breached a fiduciary duty, committed malpractice, or inflicted emotional distress.

The jury found, instead, that the Phillipses breached the retention agreement and behaved tortiously. Damages totaling almost $5 million were assessed against the Phillipses. The jury awarded the B & V law firm $3,699,259.92 for breach of contract by David and Stephan Phillips, $466,752 for false promise by David Philips, and $375,000 for defamation by David and Carolyn Phillips. The jury also awarded Attorney Bowles $375,000 for defamation by David and Carolyn Phillips, and assessed $5,000 in punitive damages against each of them.

The Phillipses appealed a trial order (A099483), the final judgments (A099484), and post-trial orders (A099770). We consolidated those appeals, along with the Phillipses' appeal of a related interpleader action (A100270).

DISCUSSION[1]

I.

PHILLIPS V. BOWLES

A099483, A099484 & A099770

Breach of contract

Ratification of the May 1998 retainer agreement.

The central claim of David and Stephan Phillips (the Phillipses) is that the trial court erred in deeming the May 21, 1998 retention agreement ratified, and thereafter using it as the operative agreement between the parties. We discern no error.[2]

"A petition to compel arbitration ' "is in essence a suit in equity to compel specific performance of a contract." ' " (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 411.) Where, as here, "a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists

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[1] We have reviewed all claims of error, but do not discuss every argument raised in over 300 pages of briefing. All arguments, however, have been fully considered.

[2] B & V maintain that the Phillipses waived their right to challenge the court's order on the motion to compel arbitration because they failed to pursue an immediate appeal of that order. The Phillipses respond that they were not an "aggrieved party" entitled to appeal the order denying B & V's motion but making findings adverse to the Phillipses concerning contract ratification. (Code Civ. Proc., § 1294, subd. (a).) Without resolving that issue, we address the merits of the Phillipses' appeal.

and, if any defense to its enforcement is raised, whether it is enforceable." (*Id.* at p. 413.)

B & V presented prima facie evidence of a written agreement to arbitrate fee disputes: the January 1996 retainer contract. The Phillipses raised a host of challenges to the January 1996 contract, necessitating court determination of the enforceability of the contract. The court concluded that the January 1996 contract was enforceable unless superseded by a later agreement. The court credited the Phillipses' argument that the parties' May 1998 retainer agreement, lacking an arbitration clause, may have superseded the January 1996 contract rather than only modifying it, as B & V maintained. However, the Phillipses invoked the May 1998 agreement to preclude arbitration while also insisting that the May 1998 agreement was not binding because it was procured by duress and fraud. The court found that the Phillipses wanted to rely upon the May 1998 contract to prevent arbitration, but also inconsistently wanted to void the contract. The court concluded that the Phillipses "cannot have it both ways. An election must be made."

The court reasonably required the Phillipses to make an election. The trial court found, upon substantial evidence, that the applicable contract was either the January 1996 contract, providing for arbitration, or the May 1998 agreement, without an arbitration provision. The Phillipses' argument for a third alternative—that the parties' relationship was governed by an oral agreement and not written agreements of either 1996 or 1998—was rejected by the court after an evidentiary hearing.[3]

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[3] While asserting that only an oral agreement governed the parties' relationship, the Phillipses also contested the validity of the oral agreement—precisely because it was not in writing. The Phillipses' ultimate position, as stated on appeal, is that B & V may only recover in quantum meruit for pretrial services through January 1997, when the Phillipses claim that B & V breached its fiduciary duty by requiring a promissory note to secure its fees. The jury found no breach of fiduciary duty.

The trial court's factual determination necessitated a choice for the Phillipses between the two written contracts. The Phillipses resisted that choice. They wanted both to use the May 1998 agreement (by asserting its supremacy over the earlier contract requiring arbitration of fee disputes), and yet also to invalidate the May 1998 agreement. In short, the Phillipses sought to avoid arbitration by affirming the May 1998 agreement, and then contested that same agreement once arbitration was avoided. The trial court properly ruled that the Phillipses could not obtain benefits under the May 1998 agreement without ratifying the agreement.

On appeal, the Phillipses challenge the trial court's finding that the January 1996 contract (with an arbitration clause) was enforceable unless superseded by a later agreement. The Phillipses argue that the January 1996 contract was unenforceable because it was contrary to the mandatory fee arbitration act (MFAA), which makes arbitrating attorney fee disputes voluntary for clients. (Bus. & Prof. Code, § 6200 et seq.) However, our Supreme Court has recently confirmed that a client waives his or her right to MFAA Arbitration, and MFAA procedural protections, by initiating a legal malpractice lawsuit, as the Phillipses later did here. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974; see Bus. & Prof. Code, § 6201, subd. (d).)

The trial court also properly found that the January 1996 contract's provision for arbitration of "fee disputes" applied to the dispute between the parties. On appeal, the Phillipses deny that their dispute with B & V was a fee dispute. However, there was substantial evidence that the Phillipses' grievance with B & V, while variously characterized, was a dispute over the compensation due B & V. Significantly, the Phillipses' complaint was founded upon allegations that B & V incurred excessive fees and "extort[ed]" modifications to the parties' retainer and fee agreement.

The Phillipses present other challenges to the January 1996 contract, including claims that the contract applied only

to B & V's initial retention to provide advice, and not to its subsequent provision of litigation services implementing that advice. The Phillipses also claim that Stephan Phillips, while admittedly represented by B & V, was not a party to the retention contract and never agreed to compensate B & V for its legal representation. These claims are unsupported by the record, which contains substantial contradictory evidence.

The trial court thus properly found that the January 1996 contract (with an arbitration clause) was enforceable unless superseded by a later agreement. The court also properly found that the Phillipses' invocation of a later agreement, the May 1998 agreement, as a superseding document precluding arbitration, ratified the May 1998 agreement. The Phillipses' ratification of the May 1998 agreement waived their rights to argue that the agreement is void as a result of duress, fraud, failure of consideration, or any other reason. Accordingly, the Phillipses' claim that the May 1998 agreement is void because it was "extorted," "usurious," "unconscionable," or otherwise objectionable are not cognizable on appeal.

Breach of contract damages

In addition to contesting the validity of the May 1998 contract on appeal, the Phillipses also challenge the jury's assessment of $3.7 million in breach of contract damages. The amount awarded exactly matches the amount claimed by B & V, and is supported by Attorney Bowles's testimony and accounting evidence presented to the jury. The evidence included testimony that B & V spent 9,000 hours representing the Phillipses, and advanced litigation expenses of about $180,000.

The Phillipses acknowledge B & V's entitlement to hourly fees and cost reimbursement, but claim that the jury improperly included in its damages award interest on unpaid fees and bonuses. However, the Phillipses fail to carry their burden in challenging the sufficiency of the damages

evidence. The Phillipses rely exclusively upon their interpretation of disputed contract terms, and fail to acknowledge contradictory evidence. "A party who challenges the sufficiency of the evidence to support a particular finding must show the evidence on that point, favorable and unfavorable, and show how and why it is insufficient." (*Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208.) The Phillipses have not complied with these requirements, and thus fail to refute Attorney Bowles's testimony supporting the jury's calculations.

The interest assessed, for example, is supported by Attorney Bowles's testimony that B & V applied a 10 percent legal rate of simple interest to amounts due and unpaid under the May 1998 contract. The Phillipses argue that no interest should have been assessed because the contract's terms do not include an interest provision. However, in jury instructions unchallenged on appeal, the measure of contract damages was defined as "[t]he amount due by the terms of the contract, and [¶] . . . [s]imple interest thereon, at a rate of ten percent (10%) from the date of the breach."

The Phillipses' dispute with bonus assessments is equally untenable. The May 1998 contract provided two bonus provisions: a tripling of advanced costs and a contingency bonus granting a percentage of the recovery in the underlying insurance litigation. As concerns costs, the contract provided that the Phillipses were to reimburse costs, and separately provided that B & V was entitled to "a total of three times the amount" of any unreimbursed expenditure advances by the firm. Attorney Bowles testified that B & V understood the contract to mean that B & V was entitled to cost recovery plus a bonus of triple costs. Attorney Bowles explained that the firm "specifically negotiated as a bonus . . . three times these expenses" because the firm was "tired of having to finance" the litigation. The Phillipses failed to object at trial to the introduction of this extrinsic evidence interpreting the contract to permit a separate, tripled cost

bonus and thus may not now assert that the contract unambiguously excludes that interpretation.

The contingency bonus included in the damages award is also supported by the evidence. The May 1998 contract grants B & V a bonus equal to five percent of "any amount received" by the Phillipses for compensatory damages, and fifteen percent of "any amount receive" for punitive damages, less bonuses and fees received by B & V under the contract. Attorney Bowles testified, again without objection, that the phrase "any amounts received" was intended by the parties to include attorney fees, costs, and interest awarded upon the compensatory and punitive damages. B & V calculated its bonus as $137,561 on the compensatory component of the recovery, and $584,866 on the punitive damages component.

The Phillipses appear to content that the contingency bonus should have been calculated on the verdict amount in the underlying insurance case alone, exclusive of fees, costs, and interest. Using the verdict amount, offset by B & V's bonuses and fees, the Phillipses argue that no bonus is due under the May 1998 contract, despite B & V obtaining a multimillion-dollar verdict. The Phillipses further argue that this result is dictated by the contract, which the Phillipses insist we should review de novo. De novo review is not appropriate. "This was not an instance where uncontradicted extrinsic evidence was considered to interpret an ambiguous writing, thus permitting independent appellate review." (*Alpine Ins. Co. v. Planchon* (1999) 72 Cal.App.4th 1316, 1324.) Instead, conflicting extrinsic evidence was presented as to whether fees, costs, and interest received by the Phillipses were intended to be included in the contract's provision for a bonus calculated upon "any amounts received." Resolution of this conflict rested with the jury, which was free to accept Attorney Bowles's testimony on this point. That testimony constitutes substantial evidence supporting the damages award.

The Phillipses' final argument against the contract damages award is that it was not reduced to reflect credit for a payment of $1,044,930,72 made in March 2002, just before trial. While the damages award itself was not reduced, the trial court acknowledged and credited the payment in setting the appeal bond. The court did not, as the Phillipses suggest, disregard the payment or hold that B & V could collect the full amount of the judgment without crediting the payment. The court simply applied the payment as a credit against the judgment, rather than reducing the judgment amount. The court's treatment of the payment is not an abuse of its discretion. Application of the payment as a credit, rather than as an award reduction, does not allow B & V "to steal" a million dollars, as the Phillipses contend. The Phillipses are entitled to a credit of $1,044,930.72 against the judgment at the time of collection.

Defamation

David and Carolyn Phillips contest the jury's finding that they defamed B & V and Attorney Bowles. That finding was founded upon multiple writings in which the Phillipses accused B & V and Attorney Bowles of "extortion" and "criminality," among other misdeeds. The Phillipses acknowledge that their "denunciations of B & V were caustic," but maintain that the statements were true, and within the litigation privilege. (Civ. Code, § 47, subd. (b).)

The trial court properly found that the Phillipses' statements exceeded the litigation privilege. The litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The last two requirements are related: "The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the

requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action." (*Id.* at pp.219-220.) In short, the statement must have some "reasonable relevancy to the subject matter of the action." (*Id.* at p. 220.)

The relevancy requirement is real. Civil Code "section 47 [subdivision] (b) does not prop the barn door wide open for any and every sort of prelitigation charge or innuendo, especially concerning individuals." (*Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 150.) In *Nguyen*, an attorney representing a corporation, Proton Technology Corporation (Proton), wrote to a competing company demanding that the competitor stop soliciting Proton employees and customers. (*Id.* at p. 143.) The attorney asserted that one of the competitor's employees making the solicitations, who formerly worked for Proton, "was working for Proton under a work furlough program sponsored by the Santa Clara County Probation Department . . . [and] was in prison for repeatedly and violently assaulting his wife."(*Id.* at pp. 143-144.) The attorney corrected his accusation of criminal conduct in a later letter, accurately stating that the employee had been jailed for shooting at an unoccupied vehicle. (*Id.* at pp. 144-145.) The disparaged employee sued Proton for libel, and the court held that the attorney's statements were not protected by the litigation privilege. (*Id.* at pp. 145, 152.) The court found that any connection between a criminal conviction (for either wife beating or firearm use) and the civil unfair competition focus of the attorney's demand letter was tenuous, at best. (*Id.* at p. 151.) The court refused to immunize the attorney's accusation of criminal conduct, noting that "the use of criminal records of individuals in purely civil disputes . . . is and should be fraught with peril." (*Id.* at p. 152.)

The trial court made a similar finding here, ruling that the Phillipses' allegations of criminal conduct bore no logical connection or relation to the objects of the litigation. The Phillipses challenge that finding, and maintain that their

allegations of criminal misconduct were central to their case. Specifically, the Phillipses argue that their claims of "extortion" were directly relevant to their legal claims that the May 1998 contract was invalid because it was extorted, and that B & V breached their fiduciary duty by extorting that agreement. The trial court rejected these claims, noting that the Phillipses' legal claims required only a showing of coercion, not criminal extortion. More importantly, the Phillipses' accusations of extortion were not narrowly focused upon B & V's conduct concerning the May 1998 contract. In a May 3, 2001 letter copied to two judges, Carolyn Phillips wrote that "Bowles and Verna is resolute in continuing its pattern of extortion and wrongdoing." On May 8, 2001, the written accusations against B & V included charges of "fraud, extortion, and criminal conspiracy," and a statement that the Phillipses "will never give in to this type of criminality." These accusations of "criminal conspiracy" and "criminality" wee extraneous to the Phillipses' efforts at contract rescission and thus outside the scope of the litigation privilege.

The Phillipses also contend that only Carolyn Phillips was responsible for the statements found defamatory, and that there is insufficient evidence supporting the jury's verdict that David Phillips also defamed B & V and Attorney Bowles. Carolyn Phillips was the signatory on the disparaging letters, but the Phillipses are mistaken in asserting that one can be held liable for defamation only if one personally publishes the offending statement to a third party. In fact, "[t]he general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation." (*Jones v. Calder* (1982) 138 Cal.App.3d 128, 134.) Also, a person may be liable for defamation by his or her agent. (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 411.) David Phillips's initials appeared on two of the defamatory letters, and Carolyn Phillips conceded that David might have prepared at least one of the letters. Carolyn Phillips also conceded that she was acting as the attorney for David Phillips in writing the letters. Upon this evidence, the jury could

conclude that David was responsible for the defamation, along with Carolyn.

As a final argument against the defamation verdict, the Phillipses maintain that their statements were true—that B & V attorneys *are* criminals and extortionists—and that the trial court wrongly precluded introduction of evidence on this point at trial. It is not clear exactly what evidentiary ruling or rulings the Phillipses contest. It appears that the Phillipses may be contesting an in limine ruling in which the court held that they could not assert that the May 1998 contract was extorted, because its validity had been ratified. However, the court denied B & V's in limine motion to the extent that it sought to exclude all evidence that B & V attorneys were extortionists or criminals. The Phillipses also seem to contest a later, midtrial ruling by the court denying their motion to ever the defamation cause of action. The Phillipses moved to sever the cause of action on grounds that Carolyn Phillips wished to present truth as a defense, and was precluded from doing so by the in limine ruling. The court denied the motion as untimely, and also stated that the Phillipses' offer of proof failed to establish the requisite elements of criminal extortion necessary to establish truth as a defense.

While the trial court barred evidence that the May 1998 agreement was criminally extorted, the court permitted evidence that the May 1998 agreement was coerced, expressly holding that Carolyn Phillips could testify that she believed B & V attorneys were extortionists because "they coerced this May agreement." The court further permitted Carolyn Phillips to testify as to her understanding of the word "extortion," and she testified that she used the term "extortion" to mean taking advantage of someone in a vulnerable position. Carolyn Phillips provided additional testimony to support her accusations of extortion and criminality, and at one point on cross-examination justified her statements on grounds that B & V "had a knife at our back the whole time and still do."

Contrary to the Phillipses' claims on appeal, the trial court did not preclude the Phillipses from proving the truth of the statements, but only limited the evidence admissible on the point. The lack of significant evidence offered to prove truth as a defense is less attributable to the court's evidentiary rulings than to the Phillipses' inability to conform to the limitations imposed and present relevant evidence. In examining Carolyn Phillips, the Phillipses were free to present evidence of coercion or exploitation to support the defamation defense, but they repeatedly squandered that opportunity by infringing upon the court's rulings or otherwise asking improper questions. The evidentiary limitations were proper and worked on prejudice.

Fraudulent False Promise

The jury found that David Phillips falsely promised to perform under the May 1998 agreement, without any intention to perform, and assessed damages of $466,752 for the B & V firm's reliance on that promise. The Phillipses contend that the verdict cannot be sustained because B & V extorted the agreement, and the Phillipses were precluded from proving that extortion. The Phillipses' extortion claim is untenable in light of their ratification of the May 1998 agreement, as previously discussed.

However, the Phillipses' contention that the fraudulent false promise damages awarded are duplicative of the damages awarded for breach of contract is meritorious. Multiple causes of action do not entitle a party to multiple damages. "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158.) Recovery of damages for both breach of contract and false promise is proper only if "separate items of compensable damage are shown by distinct and independent evidence." (*Id.* at p. 1159; accord

Walker v. Signal Companies Inc. (1978) 84 Cal.App.3d 982, 995-996.)

Our review of the record finds no evidence of $466,752 in false promise damages as a separate item of compensable damage apart from damages suffered, and awarded, for breach of contract. On appeal, B & V cites no evidence quantifying false promise damages or otherwise distinguishing those damages from breach of contract damages. B & V does point to Attorney Bowles's testimony that B & V "wrote off" an unspecified amount of fees in preparing the original billings, but this vague evidence is insufficient to support the false promise damages award. Attorney Bowles testified that the billings were appropriately reduced given the charges and work performed, and never associated the reduction with reliance upon the Phillipses' fraudulent promise to perform. B & V's closing argument to the jury acknowledged that lack of any evidence of fraud damages separate from breach of contract damages: "Our damages on the fraud are basically the same plus perhaps that on the fraud as they are with the breach of contract. But the judge will make sure we don't get duplicate recovery. It is important for you to fill out the jury verdict, thought, ignoring the fact that there seems to be overlapping damages there." The false promise damages are duplicative of and overlapping with the breach of contract damages, thus requiring modification of the judgment to reduce the damages recovery by $466,752.

Additional claims

The Phillipses raise a number of additional claims. Concerning punitive damages, the Phillipses' sole claim is that damages cannot be awarded because the defamation and false promise verdicts underlying the award are insupportable. Having rejected the Phillipses' challenge to the jury's finding of liability on those tort causes of action, the claim against punitive damages fails. The Phillipses also

contest a terminating sanction dismissing Stephan Phillips's intentional infliction of emotional distress claim upon his refusal to submit to a mental examination. Dismissal was proper. (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 838-840; Code Civ. Proc., §§ 2023, subd. (b)(4)(C), 2032, subds. (a), (f).)

The Phillipses also contest entry of directed verdict for Attorneys Verna and Reager upon contentions that the court's ruling was founded upon ratification of the May 1998 agreement, which ratification this Phillipses dispute. Those contentions are defeated by our affirmance of the trial court's ratification finding. Moreover, the Phillipses misstate the basis for the directed verdicts. Directed verdict was entered for Attorneys Verna and Reager because there was no evidence that they were responsible for the alleged wrongdoing, which the Phillipses even conceded as to Attorney Reager on the motion for directed verdict.

The court's summary adjudication of issues relevant to the Phillipses' malpractice cause of action is also challenged. The Phillipses alleged that B & V negligently failed to recover a sufficient award of fees and costs in the insurance action. B & V recovered almost $1 million in fees and costs, but the Phillipses maintain that they were entitled to more under *Brandt v. Superior Court* (1985) 37 Cal.3d 813. Brandt holds that an insured may recover, as an element of tort damages, attorney fees reasonably incurred to compel payment of tortiously withheld insurance benefits. (*Id.* at p. 815.) However, fees incurred to obtain benefits due under a policy "must be distinguished from recovery of attorney's fees *qua* attorney's fees, such as those attributable to the bringing of the bad faith action itself." (*Id.* at p. 817.)

The Phillipses argue that B & V would have recovered a greater award of *Brandt* attorney fees if they had used more care in segregating their fees between prosecution of the insurance claim and the bad faith claim. The trial court properly found that there was no support for this argument. The court's allocation of fees in the insurance

case was in exercise of its broad discretion, and the Phillipses failed to show that better record keeping would have made any difference in the amount awarded. There was likewise no support for the Phillipses' claim that they would have been awarded "costs" under *Brandt* absent B & V's negligence. The Phillipses were awarded litigation costs in the underlying insurance case. (Code Civ. Proc, § 1032.) There is no authority for the Phillipses' claim that *Brandt* permits recovery of all expenses incurred in prosecuting an action to recover policy benefits, even if the expenses fall outside the statutory definition of "costs" under Code of Civil Procedure section 1032.

Attorney fees

As their last claim of error, the Phillipses maintain that the contractual attorney fee award of $972,250 is insupportable. (Civ. Code, § 1717.) The Phillipses are correct. The operative contract is the May 1998 agreement, which does not contain any provision for the award of attorney fees. However, B & V claims that deeds of trust (containing attorney fee provisions) are part of the same transaction covered by the May 1998 agreement, and so must be read together. (Civ. Code, § 1642.) The deeds of trust were filed in January and August 1997 against the Phillipses' properties in Beverly Hills and Martinez to secure promissory notes issued by David and Stephan Phillips to Attorney Bowles for unpaid attorney fees.

"It is generally a factual question whether several documents were intended to govern the same transaction. [Citation.] However, '[i]nterpretation of a contract presents a question of law unless it depends on conflicting evidence, and an appellate court is not bound by a trial court's interpretation which does not depend on the credibility of extrinsic evidence." (*Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 378.) The only extrinsic evidence presented on the motion for attorney fees as to whether the deeds of

trust and May 1998 agreement constitute a single transaction was a short, uncontradicted declaration by Attorney Bowles. The parties have not cited any additional extrinsic evidence introduced on the issue. The interpretation of the documents therefore presents a question of law.

We conclude that the deeds of trust and May 1998 agreement do not constitute a single transaction as to warrant extension of the deeds' attorney fee provision to enforcement of the May 1998 agreement. An important factor in that determination is the May 1998 agreement itself, which contains an integration clause: "This agreement constitutes the entire agreement between Client and the Firm, and there are no other agreements or understandings between the parties not specified in this agreement. There will be no change of this agreement unless such is in writing and signed by all parties hereto." Contrary to B & V's argument on appeal, the May 1998 agreement does not expressly incorporate the deeds of trust within its terms, but simply acknowledges the deeds' existence: "Client acknowledges that the amount of fees and costs incurred and owed as of April 1, 1998 is $470,887.54, payment of which is secured by a $400,00 deed of trust on 370 Lindsay Drive in Martinez and a $250,000 deed of trust on 10022 Westwanda Drive in Beverly Hills."

Another factor against joint construction of the documents is that the deeds were issued by the Phillipses in favor of Attorney Bowles as beneficiary, whereas the agreement is between the Phillipses and the B & V law firm. Moreover, the narrow terms of the deeds' attorney fee provisions resist an extension of their provisions to the later executed May 1998 retainer agreement. The deeds provide that the Phillipses, as trustors, shall pay reasonable attorney fees in a "proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee." B & V prevailed on its breach of contract claim, not on a foreclosure of the deeds of trust or other relief related to Attorney

Bowles's rights as beneficiary. In fact, the promissory notes were paid and the deeds of trust reconveyed before trial.

This case differs from *Boyd v. Oscar Fishing Co., supra*, 210 Cal.App.3d 368, upon which B & V rely. In *Boyd*, attorney fees were awarded to a manufacturer for its dealer's breach of contract where an attorney fee provision was contained in product invoices but not the dealership agreement itself. (*Id.* at pp. 378-380.) There was no evidence in *Boyd* that the dealership agreement was intended to be the final and exclusive expression of the parties' agreement and, instead, there was substantial evidence that the parties added terms to the dealership agreement by subsequent invoices. (*Id.* at p. 379.) Among that evidence was the dealership agreement itself, in which the dealer agreed "to pay invoices on terms established by manufacturer." (*Ibid.*) In contrast to *Boyd*, the May 1998 agreement contains an integration clause signifying that the agreement is the final and exclusive expression of the parties' agreement, and B & V has cited no evidence that the parties added terms to the agreement by antecedent deeds of trust.

Finally, we note that the jury was specifically instructed that "[t]he contract at issue here is the written agreement dated May 21, 1998." There was no mention of the deeds of trust. B & V is not entitled to contractual attorney fees unauthorized by the contract tried to the jury. We accordingly modify the judgment to eliminate the award of fees.

II.

FARMERS INSURANCE EXCHANGE V. PHILLIPS

INTERPLEADER ACTION
APPEAL NO. A100270

On March 14, 2001, this court modified and affirmed judgment for David and Stephan Phillips (the Phillipses) against their insurers for wrongful denial of a fire loss claim.

(*Phillips v. Fire Insurance Exchange* (March 14, 2001, A087049) [nonpub. opn.].) On May 7, 2001, the insurers filed an interpleader action in which they alleged that the Phillipses and B & V, the Phillipses' attorneys in that prior action, were asserting conflicting claims to the damages award. (Code Civ. Proc., § 386.) The insurers, Farmers Insurance Exchange and Fire Insurance Exchange (Farmers), deposited the full amount of the judgment and accrued interest (almost $10 million) with the court and asked that Farmers be discharged from liability on the conflicting claims, and that the Phillipses and B & V be required to litigate their right to the judgment between themselves.

On August 31, 2001, the court discharged Farmers from the case and awarded it attorney fees of $56,000 and costs of $215.60 from the interpled funds, while reserving jurisdiction as to the allocation of those fees and costs among the defendants. (Code Civ. Proc., § 386.6.) The Phillipses appealed the discharge and fee order, but then abandoned the appeal and requested dismissal after filing their opening brief. We dismissed the appeal.

On August 10, 2002, the court granted summary judgment to the Phillipses. The court found that the jury's adjudication in a related case of the amount of attorney fees owed B & V, which is the subject of the other appeals decided here, established the amount due B & V from the interpled funds and effectively resolved its conflicting claim to the funds. The court found that the Phillipses were entitled to distribution of the interpled funds, less the amount of the cash deposited in lieu of bond on the Phillipses' appeal of the judgment for B & V in that related case. (Code Civ. Proc., § 995.710.) The court ordered the release of all funds to the Phillipses in excess of about $7.5 million that was being held to secure the judgment for B & V. The court also apportioned its prior award of $56,000 in fees to Firemans against the Phillipses for $44,800, and against B & V for

$11,200.[4] The percentage allocation was thus 80 percent to the Phillipses, and 20 percent to B & V.

The Phillipses purport to appeal the "final judgment" in the interpleader case. However, no judgment appears in the record, only the order granting the Phillipses' motion for summary judgment and ordering release of the interpleader funds. An order granting a summary judgment motion is not appealable. (*Cohen v. Equitable Life Assurance Society* (1987) 196 Cal.App.3d 669, 671.) But it is clear that the trial court intended to finally dispose of the action, so we will deem the order granting the summary judgment motion to incorporate a judgment and proceed to the merits. (*Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App. 4th 1, 6.)
The Phillipses assert that interpleader was an improper procedure in this case, and maintain that their demurrer to the complaint should have been sustained and Firemans not discharged from liability. However, the Phillipses acknowledged in their opening brief that the order awarding Firemans fees and costs were separately appealable, and thus was not being challenged on this appeal from later proceedings. It is the discharge order that awarded Firemans its fees and costs, and thus the Phillipses effectively concede that the order discharging Firemans as the stakeholder was appealable. (*Federer v. County of Sacramento* (1983) 141 Cal. App. 3d 184, 186.) In fact, the Phillipses *did* appeal the discharge order but voluntarily dismissed the appeal before disposition.

There is direct authority holding that an order discharging an interpleading party and awarding it attorney fees from the deposited funds is an appealable order. (*Sweeney v. McClaran* (1976) 58 Cal.App.3d 824, 827-828.) "The law of this state does not allow, on an appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken." (*Woodman v.*

---

[4] The parties mistakenly state that the court applied the same percentage apportionment to the $215.60 awarded to Farmers as costs. In fact, the court only apportioned fees to B & V, not costs.

Ackerman (1967) 249 Cal.App.2d 644, 648; Code Civ. Proc., § 906.)

In any event, we find no merit in the Phillipses' contentions that interpleader was inappropriate in this case. Firemans, as a judgment debtor, was presented with a classic situation of conflicting claims to the same funds by the judgment creditors and their attorneys. The Phillipses maintain that B & V had no valid claim to the judgment, but a stakeholder is not required to assess the validity of conflicting claims at its peril. "[T]he code requires nothing more of a plaintiff [in interpleader] '. . . than to show that the parties to be called in make claims on him for the same thing, that the respective claims are adverse to each other, and that he cannot safely determine for himself which claim is right and lawful.'" (*Williams v. Gilmore* (1942) 51 Cal.App.2d 684, 687.) The interpleader action was the proper vehicle here for breaking the deadlock and protecting Firemans from liability were it to pay funds to one of the parties making conflicting claims upon the judgment proceeds.

The Phillipses also contest the allocation of fees and costs, arguing that B & V should pay all fees and costs. The argument and tort claims were "specious," and that the firm otherwise engaged in misconduct creating a conflict over the insurance case proceeds that necessitated the interpleader action. A jury, however, rejected the Phillipses' allegations and found the Phillipses liable for breach of contract and tortious behavior. The trial court did not abuse its discretion in allocating fees and costs.

DISPOSITION

The judgment in *Phillips v. Bowles* is modified to remove fraud damages of $466,752, and is otherwise affirmed. The postjudgment order in *Phillips v. Bowles* awarding attorney fees of $972,250 is reversed. The parties shall bear their own costs and attorney fees incurred on appeal.

The order granting summary judgment in *Farmers Insurance Exchange v. Phillips* is deemed a final judgment,

and is affirmed. Respondents shall recover from appellants costs incurred on appeal, and respondent Farmers shall also recover from appellants its reasonable attorney fees incurred on appeal. The amount of fees and costs shall be determined by the trial court upon timely filing of memoranda of costs.

s/ Sepulveda, J.

We concur:

s/ Reardon, Acting P.J.

s/ Rivera, J.

Phillips v. Bowles
(A099483, A099484, A099770)

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA

DAVID PHILLIPS and STEPHAN PHILLIPS, Plaintiff/cross-defendants/ cross-complainants, vs.	C 00-01529 ORDER SETTING REASON-ABLE

RICHARD BOWLES, MICHAEL VERNA, ROBERT WESTERFIELD, KEVIN REAGER, BOWLES & VERNA, FIRST AMERICAN TITLE INSURANCE COMPANY, and DOES 1 through 40, Defendants/cross-complainants. AND RELATED CROSS-ACTIONS.	ATTORNEY'S FEES FILED Aug. 13, 2002 K. Torre, Clerk of the Court Superior Court of the State of California County of Contra Costa

The Court having previously ruled on June 20, 2002 that Bowles & Verna ("B&V") was entitled to an award of attorney's fees from David Phillips and Stephan Phillips, ordered this matter continued until July 25, 2002 and instructed B&V to submit additional information in support of its fee request. On July 25, 2002, the matter was heard in Department 5 before the Honorable Terence Bruiniers. Richard T. Bowles, Bradley R. Bowles, Kenneth G. Jones, and Mark Hancock appeared for B&V, Nancy Douglas and Carolyn Phillips appeared for the Phillips. The court having considered all papers filed in conjunction herewith and having heard all oral arguments from counsel, and good cause appearing,

IT IS HEREBY ORDERED that Bowles & Verna is entitled to reasonable attorney's fees determined by the court to be $972,250. In making this determination, the court accepted Bowles & Verna's allocation of fees reflecting time spent on this matter by Richard T. Bowles, Robert L. Westerfield, Bradley R. Bowles, Kenneth G. Jones and the law firm of Sedgwick, Detert, Moran & Arnold. The court determined that in accordance with *Gilbert v. Master Washer*

(2001) 87 Cal.App.4th 212 the fees sought did not reflect any time spent by any party acting in propria persona.

IT IS SO ORDERED.

Dated: August 8, 200[illegible]

s/ Terence L. Bruiniers
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA

DAVID PHILLIPS and STEPHAN PHILLIPS, Plaintiffs, v. RICHARD BOWLES, MICHAEL VERNA, ROBERT WESTERFIELD, KEVIN REAGER, BOWLES & VERNA, FIRST AMERICAN TITLE INSURANCE COMPANY, and DOES 1 through 40, Defendants.	C 00-01529 JUDGMENT IN FAVOR OF RICHARD BOWLES, MICHAEL VERNA, ROBERT WESTER-FIELD AND BOWLES & VERNA

RICHARD BOWLES, MICHAEL VERNA,

ROBERT WESTERFIELD and BOWLES & VERNA,

Cross-Complainants,

v.

DAVID PHILLIPS, STEPHAN PHILLIPS, CAROLYN PHILLIPS and ROES 1 Through 10, inclusive,

Cross-Defendants.

FILED
May 14, 2002
K. Torre,
Clerk of the
Court
Superior Court
of the State of
California
County of
Contra Costa

DAVID PHILLIPS, STEPHAN PHILLIPS,

Cross-Complainants,

v.

RICHARD BOWLES, MICHAEL VERNA, ROBERT WESTERFIELD, KEVIN REAGER, BOWLES & VERNA, FIRST AMERICAN TITLE COMPANY, and DOES 1 through 40,

Cross-Defendants.

This action came on regularly for trial on April 15, 2002, in Department 5 of the Superior Court, the Honorable Terence L. Bruiniers Judge presiding. A jury was impaneled and sworn, and returned Special Verdicts on May 3, 2002 and May 13, 2002. The verdicts have been confirmed by the jurors and recorded, judgment on such verdicts shall be entered accordingly, and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs and cross-complainants David Phillips and Stephan Phillips shall take nothing from defendants and cross-defendants Richard Bowles, Michael Verna, Robert Westerfield and Bowles & Verna.

2. Cross-complainant Richard Bowles shall recover $375,000 jointly and severally against plaintiffs and cross-defendants David Phillips and Carolyn Phillips for damages resulting from defamation.

3. Cross-complainant Bowles & Verna shall recover $375,000 jointly and severally against cross-defendants David Phillips and Carolyn Phillips for damages resulting from defamation.

4. Cross-complainants Richard Bowles, Michael Verna, Robert Westerfield and Bowles & Verna shall recover $3,699,259.92 jointly and severally against cross-defendants David Phillips and Stephan Phillips for damages resulting from breach of contract.

5. Cross-complainants Richard Bowles, Michael Verna, Robert Westerfield and Bowles & Verna shall recover $466,752.00 against cross-defendant David Phillips for damages resulting from fraud.

6. Cross-complainant Richard Bowles shall recover punitive damages against cross-defendant David Phillips in the amount of $5,000.

7. Cross-complainant Richard Bowles shall recover punitive damages against cross-defendant Carolyn Phillips in the amount of $5,000.

8. Cross-complainants Richard Bowles, Michael Verna, Robert Westerfield and Bowles & Verna shall recover costs of the suit in the amount of $49,192.79 jointly and severally against plaintiffs, cross-complainants and cross-defendants David Phillips, Stephan Phillips and against cross-defendant Carolyn Phillips.

9. Cross-complainants shall recover interest at the rate of ten percent per annum on all of the above amounts from the date of the entry of this judgment until the date it is satisfied.

Dated: May 14, 2002

s/ Terence L. Bruiniers
Judge of the Superior Court

(2)

No. 04-1061

Supreme Court, U.S.
FILED
FEB 22 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID PHILLIPS and STEPHAN PHILLIPS,

Petitioners,

v.

RICHARD BOWLES, MICHAEL VERNA, ROBERT WESTERFIELD, KEVIN REAGER and BOWLES & VERNA LLP,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONSE TO QUESTIONS PRESENTED

As will be set forth in detail in the body of this brief, each of the questions presented in the petition contains egregious misstatements of the record below, including the holdings of the various courts who have reviewed this case. None of the six questions presented represents a properly preserved issue of federal law.

LISTING OF PARTIES TO THE PROCEEDING

The petition correctly states the names of all parties to this case.

RULE 29.6 STATEMENT

This brief is not filed on behalf of any corporation.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Richard Bowles, Michael Verna, Robert Westerfield, Kevin Reager and Bowles & Verna LLP ("B&V") respectfully oppose the petition for writ of certiorari and request that the petition be denied.

JURISDICTION

The unpublished opinion of the California Court of Appeal was filed July 9, 2004. Petitioners' petition for rehearing was denied August 5, 2004. Petitioners' petition for review to the California Supreme Court was denied on October 13, 2004. Since the petition presents no issue of Federal law which was properly preserved by petitioners below, the Court lacks jurisdiction pursuant to 28 U.S.C. § 1257.

INTRODUCTION

Petitioners David, Stephan and Carolyn Phillips (collectively, the "Phillips") seek review on six different issues. The Phillips' petition is frivolous and should be denied.

In their first three issues, the Phillips claim that their constitutional rights were violated when the California courts incorrectly resolved certain state law issues. However, the Court has stated repeatedly that the mere allegation that a state court interpreted or applied state law incorrectly does not automatically raise a Federal due process claim. Since no properly preserved issue of Federal

law is stated with respect to these three issues, review should be denied. With respect to their fourth, fifth and sixth issues, the Phillips make no attempt at all to demonstrate an issue of Federal law, so review should be denied with respect to those questions as well.

Besides, all six issues of California state law raised by the Phillips were properly decided, based upon substantial evidence in the record and settled principles of state law.

First, the Phillips claim that the Court of Appeal required them to arbitrate matters they had not agreed to arbitrate. The Court of Appeal said nothing of the kind. The Court correctly held that the dispute between the parties was over what the Phillips' former lawyers, B&V, were owed, and that that dispute was of a kind the Phillips *had* agreed to arbitrate.

Second, the Phillips complain they were held to have ratified the May 1998 fee agreement when they explicitly refused to ratify it. Not so. In a routine and proper application of the doctrine of election of remedies, the trial court held that the Phillips could not use the May 1998 Agreement to block arbitration while simultaneously arguing that the May 1998 Agreement was void and unenforceable, and the Court of Appeal correctly affirmed.

Third, the Phillips argue that their scurrilous statements about B&V and attorney Richard Bowles were subject to California's litigation privilege, and that they were wrongly barred from proving the truth of those statements. False accusations of crime made in the context of a civil attorneys fees dispute are not privileged. The Phillips were given an opportunity to prove the truth of their allegations, and they failed.

Fourth, the Phillips argue that an "extorted" fee agreement cannot be the basis of a judgment for false promise. The Phillips' claim that the May 1998 Agreement was "extorted" is contrary to overwhelming evidence in the record.

Fifth, the Phillips claim that B&V withdrew from the case against Farmer's so any recovery by B&V must be limited to *quantum meruit*. Again, not so. David Phillips repudiated the fee agreements between the parties, so any further performance by B&V was excused, and B&V had the right to sue for total breach and seek contract damages. Besides, even if the Phillips were correct, which they are not, they have waived this argument through the doctrine of invited error.

Finally, the Phillips argue that their bogus malpractice claim should not have been dismissed, because they had the right to recover not merely attorneys fees and statutory costs in the underlying insurance bad faith case, but *all* expenses they incurred. But as the Court of Appeal observed, there is no authority supporting the Phillips' argument.

The petition should be denied.

STATEMENT OF THE CASE

Because the brief factual summary contained in the petition is riddled with misstatements of the facts relevant to the questions supposedly presented, we begin with a summary of the relevant facts.

I. FACTUAL BACKGROUND

David Phillips is an attorney who holds a Ph.D. from Stanford University. (RT 541-43.)[1] He and his brother Stephan own a partnership called Phillips Properties. (RT 541-42, 545, 712.) Their mother Carolyn is also an attorney, and has represented Phillips Properties since its creation. (RT 542, 555, 566, 714, 756, 1766-67.)

In the summer of 1994, the Phillips suffered two separate fires and two vandalism incidents at their eleven thousand square foot house in Martinez, California. (RT 553-54, 557-58, 559-60, 1407-08.) When their insurer, Farmers, made it clear that it believed the Phillips had set the fires, the Phillips began consulting attorneys. (RT 559, 561.) In January 1996, Carolyn contacted Richard Bowles at B&V.

A. The January 1996 Agreement

Mr. Bowles forwarded Carolyn the firm's standard hourly fee retainer agreement. (Exhs. 4, 5.) David signed the agreement, which was returned with a retainer check. (RT* 25-26; RT 582.) No member of the Phillips family expressed disagreement with any provision of the January 1996 Agreement. (RT* 25.)

The parties met and agreed that B&V would try to settle the Phillips' claims against Farmers, but if that effort was unsuccessful, B&V would sue Farmers on the

[1] The Phillips cite to the record from at least two of their many appeals. Throughout this brief, "RT" and "CT" refer to the Reporters' and Clerk's Transcripts, respectively, from appeal no. A099483. "RT" and "CT*" refer to the Reporters' and Clerk's Transcripts from appeal no. A096593.

Phillips' behalf. (RT* 37-38.) After negotiations with Farmers failed, Carolyn and David both agreed to go forward with litigation pursuant to the January 1996 Agreement. (RT* 27-28.) Mr. Bowles told them he would prepare a written memorialization of the parties' decision to continue to operate under the January 1996 Agreement, but Carolyn told him that such a writing was unnecessary. (RT* 27.)

As a result of Farmers' intensive litigation tactics (RT 1350-52), the Phillips' unpaid fees balance mounted rapidly. Mr. Bowles first spoke with the Phillips about the issue, and then began writing them letters, urging them to bring their account current. (RT* 64-65, 67-68; RT 626-33.) By letter dated January 24, 1997, Mr. Bowles warned David that future legal fees would reach or exceed $250,000. He confirmed that David had offered to provide B&V with a promissory note and second deed of trust on a Los Angeles house David and Stephan owned in order to secure that payment. (RT* 72, 101; Exh. 21.)

Mr. Bowles wrote David and Carolyn again on the issue of unpaid fees in late June, 1997. (RT* 69-70; Exh. 27.) In another letter written a few days later regarding the unpaid fees, Mr. Bowles pointed out that B&V had never agreed to finance expensive litigation, and raised the possibility that B&V might have to withdraw. (RT* 72.)

B. The August 1997 Agreement

Mr. Bowles wrote David again on July 18, 1997 about the unpaid fees issue. He reminded David that the firm had an inherent conflict of interest in talking about fees, and that the Phillips had the right to seek independent counsel and/or to refuse to modify the January 1996 Agreement. (RT* 76-77; Defs. Exh. H, p. 3.) The parties

began negotiating modifications to the January 1996 Agreement. After extensive negotiations in which the Phillips actively participated, suggesting various alternative arrangements, the August 1997 Agreement was signed. (RT* 80-82.)

Despite the modification to the January 1996 Agreement, the Phillips still failed to meet their obligations to pay fees as they were incurred. Mr. Bowles wrote David again about the matter on August 28, 1997, and pointed out that the litigation was being handicapped by the Phillips' failure to live up to their obligations to pay expert witnesses. (RT* 96-97; Defs. Exh. L, p. 1.)

With the unpaid fee balance continuing to mount, Mr. Bowles wrote David again on December 23, 1997. (RT* 110-11; Defs. Exh. R.) By the time of this letter, David had for the first time taken the position that the Phillips had no obligation to pay B&V's invoices on a monthly basis. (RT* 111.) Not so, Mr. Bowles said, "and we have told you that on several occasions." (RT* 111; Defs. Exh. R, p. 1.) Mr. Bowles then reviewed the history of the Phillips' delinquency. (Defs. Exh. R, p. 1-2.)

Mr. Westerfield wrote David on March 14, 1998, attaching copies of unpaid invoices. Westerfield noted that a variety of vendors – whom the Phillips had agreed to pay directly – had unpaid balances more than seven months old, and that B&V's professional relationships with the vendors were being damaged by the Phillips' delinquency. (Defs. Exh. U, pp. 1-2.) Incredibly, David responded by asking Westerfield why he should pay the court reporters, since he already had what he needed from them. (RT 1526.)

C. The Parties Negotiate and Sign the May 1998 Agreement

Shortly thereafter, with the Phillips' unpaid fees balance having reached approximately $480,000, (RT* 120), Mr. Bowles and Mr. Westerfield wrote the Phillips again. They detailed the Phillips' failure to live up to their obligations under the retainer agreement and its various modifications. (Defs. Exh. W, p. 2.) "We simply want to be paid for our time as you agreed to do in the original retainer agreement," the attorneys wrote. (Defs. Exh. W, pp. 2-3.) The attorneys also discussed the damage the firm was incurring from the Phillips' refusal to abide by their obligation to pay court reporters and other vendors. (Defs. Exh. W, pp. 3-4.)

The parties met on April 8, 1998. The meeting lasted several hours and consisted of give and take about the unpaid fees issues. (RT* 123.) David stated that he wanted to draft any new fee agreement; he forwarded a draft modification agreement on April 22, 1998, along with a cover letter stating that "I am absolutely certain that I will be able to perform under the terms of the agreement as they are now drafted." (Defs. Exh. Z, p. 1; RT* 123.)

David wrote to Mr. Bowles again on May 8, 1998, enclosing three new drafts of an agreement. "David was continuing to negotiate," Bowles testified. "Even though we'd spent a substantial period of time and thought we were close to a finalization of it he's come back with three different versions and is continuing to negotiate." (RT* 127.) "I believe that the August [1997] Agreement is valid and in full effect," David wrote. (Defs. Exh. AA, p. 4.) By negotiating yet another modification, he did not "in any

way agree to rescind or nullify the August Agreement." (Defs. Exh. AA, p. 5.)

The parties met again on May 11, 1998 (RT* 129-30), but David terminated those discussions when the B&V attorneys asked that the new agreement – just like the earlier agreements – provide for a lien on any eventual judgment the Phillips recovered from Farmers in order to ensure that the Phillips would actually pay B&V what was owed. (RT* 132; Defs. Exh. AA.)

Negotiations continued, and David finally agreed to give B&V a lien on one-half of any judgment. "Thank you for your cooperation in finally completing this Agreement," David wrote. (Defs. Exh. DD, p. 2; RT* 137-38.) The agreement was executed in late May 1998. The Phillips acknowledged that as of April 1, 1998, they owed a balance of $470,887.54 in unpaid fees. (Exh. 66.)

D. B&V Wins a Multi-Million Dollar Verdict for the Phillips, and the Phillips Respond By Repudiating All Fee Agreements With B&V

Finally, the Phillips' case against Farmers went to trial. In January 1999, after a five-and-a-half month trial, the jury returned verdicts for the Phillips of seven and one-half million dollars, including both compensatory and punitive damages. (Exh. 87.) A few days later, David repudiated all fee agreements with B&V, telling the attorneys that the Phillips had no obligation to pay the firm and that in David's view, none of the agreements he and Stephan had entered into with the firm were valid. (RT 1290-91, 1597, 1621, 1691, 1910.) At that time, the Phillips owed B&V approximately $1.5 million in hourly fees and costs plus in excess of $1 million in bonuses.

(Exhs. 449, 570.) Overall, B&V had expended over 9,000 hours in attorney and paralegal time representing the Phillips, and the Phillips had paid B&V approximately $60,000. (RT* 150; RT 1307, 1913-14, 1939-41.)

For a few months after David and Stephan repudiated the agreements, B&V continued to try to negotiate a resolution to the dispute, while handling post-trial motions on the Phillips' behalf. (RT 844, 1560, 1691, 1913-15.) Finally, in early May, with David still recalcitrant, B&V executed a substitution of attorneys, and Carolyn began representing her sons. (RT 703, 1141, 1915.)

II. THIS LITIGATION

A. David and Stephan Sue Bowles & Verna Over the Fee Dispute

Rather than paying B&V what they owed, David and Stephan sued the firm, Mr. Bowles, Mr. Verna, Mr. Westerfield and associate Kevin Reager. The Phillips purported to state no less than ten different causes of action against their former attorneys, including *inter alia*, legal malpractice, intentional infliction of emotional distress, and, of course, alternative claims for rescission and/or breach of contract with respect to the various fee agreements. (CT* 1-37.)

B&V petitioned for an order compelling arbitration, as provided in the January 1996 Agreement, as modified. (CT* 85-121.) The court conducted an evidentiary hearing, receiving testimony from the parties and numerous exhibits. The court held that the Phillips were seeking inconsistent remedies by attempting to block arbitration through the shield of the May 1998 Agreement (which did not have an express arbitration clause) while simultaneously

arguing that the May 1998 Agreement was void. (CT* 527.) The court gave the Phillips a choice: they could either agree to binding arbitration under the January 1996 Agreement, as modified, or they could ratify the May 1998 Agreement and waive all defenses thereto, and thus block arbitration. (*Id.*)

The Phillips responded by seeking to disqualify the trial judge. David Phillips' declaration in support of the motion to disqualify offers a lengthy laundry list of charges against the judge, including: (1) the judge was "resentful and jealous" of the Phillips (CT *542); (2) David was "smarter and better educated" than the judge, who was accordingly "offended, insecure, resentful, jealous and vindictive" (CT* 543); (3) the judge was either "lying in order to benefit Mr. Bowles" or "utterly incompetent" (CT *545); and (4) the judge was conspiring with B&V to defraud David and Stephan. (CT* 538, 548-49.) The Phillips threatened to sue the judge and Contra Costa Superior Court for violations of their civil rights and fraud if the judge was not disqualified. (CT* 549.) After a hearing, the Phillips' motion to disqualify was denied. (CT* 610-11.)

Simultaneously, the Phillips filed a response to the trial court's order that they elect a remedy. The Phillips took neither option offered by the court, purporting to simultaneously rescind the May 1998 Agreement while still opposing arbitration under the previous agreements. (CT* 595-601.) In that filing, the Phillips once again insulted the trial judge, accusing the Court of having "become a willing co-conspirator in Defendants' efforts to defraud Plaintiffs," that the court's decision was "ignoble" and "patently asinine," and that the court should "refrain from any further mischief." (CT* 596, 598, 600-01.)

B. B&V's Counterclaim For Breach of Contract, Fraud and Libel

The B&V defendants filed a cross-complaint against David, Stephan and Carolyn Phillips for, *inter alia*, fraud, breach of contract, declaratory relief, intentional infliction of emotional distress and libel *per se*. (CT* 760-74.) Prior to trial, B&V filed a motion for summary adjudication, seeking a finding that the Phillips, through their conduct, had ratified the May 1998 fee agreement. The trial court granted summary adjudication on that issue. (CT 468.)

C. The Jury Finds for B&V

After a 15-day trial, the jury returned a verdict for B&V. (RT 2209.) The jury unanimously rejected the Phillips' claims that B&V had breached its fiduciary duties to them, as well as their claims that either Mr. Bowles or Mr. Westerfield had committed malpractice in connection with the representation. (RT 2210-11.) With respect to B&V's claims against the Phillips, the jury unanimously found that: (1) David and Stephan had committed unexcused breaches of the May 1998 Agreement, damaging B&V in the amount of $3,699,259.92 (RT 2219-20); (2) David Phillips was guilty of false promise, damaging B&V in the amount of $466,752 (RT 2217-18); and (3) David and Carolyn Phillips had defamed Richard Bowles and B&V, damaging them in the amount of $375,000 each. (RT 2212-16.) After a brief second phase, the jury awarded an additional $5,000 in punitive damages against both David and Carolyn. (RT 2307-08.) Post-trial motions resulted in an award of attorneys' fees and costs against the Phillips. (CT 6965-6971.)

D. The Court of Appeal's Decision

The Phillips appealed the various judgments. After voluminous briefing in which the Phillips pursued literally dozens of claims of error, the Court of Appeal affirmed the judgments in most respects.

The Court of Appeal agreed that the trial court properly required the Phillips to elect their remedy, given the Phillips' insistence on simultaneously relying on the May 1998 Agreement to block arbitration while still asserting that the Agreement was void. (App. to Pet. at IX-XII.) The Court found that the jury's award of breach of contract damages was supported by substantial evidence in the record. (*Id.* at XII-XV.) The Court affirmed the judgment for libel, finding that the Phillips' statements were not privileged, and that the Phillips had not been precluded from trying to prove the truth of their assertions. (*Id.* at XV-XIX.) Finally, the Court affirmed the dismissal of the Phillips' malpractice claim, holding that the Phillips had failed to offer evidence that anything B&V did caused them damage, and that there was no authority for the Phillips' insistence that costs are recoverable under *Brandt v. Superior Court*, 37 Cal.3d 813 (1985). (*Id.* at XX-XXII.) The Court reversed on only two issues, finding that the damages awarded for false promise were duplicative (*id.* at XIX-XX), and that the attorneys' fees award was unjustified because the deeds of trust were not incorporated into the May 1998 Agreement. (*Id.* at XXII-XXIV.)

E. The Phillips' Petition for Rehearing

Just as they had when the trial court ordered them to elect between their remedies, the Phillips responded with a torrent of contemptuous invective directed at the Court.

"This court's decision affirming [the] judgment is corrupt," the Phillips wrote. (Pet. Reh. at 4.) The Phillips continued:

> In order to affirm the judgment, this court has omitted most of the Phillips' issues and arguments on appeal, has repeatedly and brazenly misstated and misrepresented the facts of this case, has advanced several logically absurd and untenable arguments, and has obstinately refused to follow the law. This court's decision is furthermore marred by obvious bias, inattention, carelessness, reflexive recitation of cliché, and seems to have been prepared without ever having bothered to read the Phillips's Reply Brief. This court should be profoundly ashamed of itself.

(*Id.* at 4-5.)

The Phillips challenged eleven different aspects of the Court of Appeal's decision, repeatedly accusing the Court of Appeal of fraud and corruption and claiming that the Court's decision "negates the authority of the state" and "plung[es] the world back into savagery." (*Id.* at 44.) The Court's reasoning, according to the Phillips, was "precisely the type of thinking . . . that ends in Auschwitz, the Soviet Gulag . . . the Cultural Revolution, and . . . the Inquisition." (*Id.* at 44-45.) "Look in the mirror," the Phillips invited the Court. "You will see the banality of evil." (*Id.* at 45.)

The Court of Appeal denied rehearing, as well as the Phillips' request that the Court publish its decision.

F. The Phillips' Petition for Review to the California Supreme Court

The Phillips then petitioned the California Supreme Court for review of the same six issues raised in the petition for writ of certiorari. The California Supreme Court denied review on October 13, 2004.

G. The Phillips Voluntarily Satisfy the Judgment

Because the disputed amounts were deposited with the clerk of the court, the Phillips did not post a supersedeas bond to secure the judgment while it was on appeal. However, following the Supreme Court's denial of review, the Phillips filed a motion with the trial court asking that the money be released and the judgment paid in full. The motion was granted, the judgment was paid, and a notice of satisfaction of the judgment was filed.

REASONS FOR DENYING THE WRIT

I. THE PETITION PRESENTS NO PROPERLY PRESERVED ISSUES OF FEDERAL LAW, AND THE COURT THEREFORE LACKS JURISDICTION TO REVIEW THE JUDGMENT

The Court has jurisdiction to review the judgments of the state courts, *inter alia*, where "any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257.

Petitioners half-heartedly attempt to bring their first three issues presented within the scope of Section 1257 by alleging that their constitutional rights were violated because the state courts incorrectly decided issues of state

law. However, the Court has repeatedly recognized that a mere error in the application of state law is not a denial of due process. *Engle v. Isaac*, 456 U.S. 107, 121 n. 21 (1982). Otherwise, every alleged misapplication of state law would constitute a federal constitutional question subject to Supreme Court review. *Beck v. Washington*, 369 U.S. 541, 555 (1962); *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930)(dictum); *American Ry. Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927).

Petitioners make no attempt at all to point out any basis in Federal law for their last three issues they present for review. The Court lacks the authority to review state court determinations of purely state law. *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). This is so even when a properly preserved substantial question of federal law is also present in the case. *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589, 597-98 (1934).

Even if any Federal issues were presented, petitioners still would have the burden under the Court's Rule 14.1(g)(i) of demonstrating:

> the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners fail to demonstrate that any of their purported "Federal" issues were properly preserved for the Court's review. Although they cite to their Petition for Rehearing before the Court of Appeal with respect to certain issues (Pet. at 12, 13, 26, 27), raising a Federal issue in a petition for rehearing is not sufficient. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

The petition should be denied on the grounds that it contains no properly preserved issue of Federal law, and the Court is accordingly without jurisdiction.[2]

II. THE COURT OF APPEAL PROPERLY FOUND THAT SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S APPLICATION OF THE ARBITRATION CLAUSE TO ALL DISPUTES BETWEEN THE PARTIES

The January 1996 Agreement, which governed the representation until at least May 1998, contained a clause requiring binding arbitration of "all fee disputes." (Exh. 5,

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[2] There is authority for the proposition that where a state court has rejected a claim of Federal right on state law grounds, the Court may inquire not whether the state law question was correctly decided, but whether "fair support" exists in the record for the state court's action. *E.g., Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux*, 279 U.S. 737, 744-46 (1929); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U.S. 246, 261-62 (1912). However, the Phillips are not making a claim of Federal right here, which was defeated on state law grounds; rather, the Phillips claim that their Federal rights were violated by the California courts' resolution of the state law issues. Nevertheless, we show below that the various state-law holdings of the California Court of Appeal are amply supported by the law and the record.

p. 3, ¶ 9.) The trial court found that the clause applied to the dispute between the parties, and the Court of Appeal affirmed:

> The trial court also properly found that the January 1996 contract's provision for arbitration of 'fee disputes' applied to the dispute between the parties. On appeal, the Phillipses deny that their dispute was a fee dispute. However, there was substantial evidence that the Phillipses' grievances with B&V, while variously characterized, was a dispute over the compensation due B&V. Significantly, the Phillipses' complaint was founded upon allegations that B&V incurred excessive fees and "extort[ed]" modifications to the parties' retainer and fee agreement.

(App. to Pet. at XI.)

The Phillips claim that this routine conclusion somehow constitutes a holding that parties may be required to arbitrate matters beyond the scope of their agreement. (Pet. at 9.) In fact, neither the trial court nor the Court of Appeal ever said anything of the kind; rather, both courts properly held that the dispute between B&V and the Phillips was fundamentally one over the fees due to B&V, a matter that the Phillips *had* agreed to arbitrate.

That holding was plainly correct. As the Court of Appeal noted, the Phillips' Complaint consists of repeated charges that (1) B&V negligently underestimated the total fees which the Phillips would incur in the litigation; (2) B&V incurred excessive fees; (3) every fee agreement that the parties had ever entered into was void for multiple reasons; and (4) B&V's willingness to revise the fee arrangements between the parties in hopes that the Phillips would meet their commitments to B&V somehow constituted

a breach of fiduciary duty. (CT* 3-4, 6-33.) Melvin Phillips, David and Stephan's father, has admitted that the Phillips' bogus malpractice claims were brought in order to give them negotiating leverage in connection with the fee dispute between the parties. (CT* 095.) Moreover, Richard Bowles testified that he believed that the arbitration clause applied to all disputes between the parties, and that the Phillips never questioned the breadth of the clause. (RT* 33, 83, 241.)

The trial court, sitting as a trier of fact on the petition to compel arbitration, properly resolved this dispute of fact by concluding that B&V's evidence regarding the nature of the dispute and the breadth of the arbitration clause was worthy of belief, and the contrary testimony of David Phillips was not. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 972 (1997).

III. THE COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT'S HOLDING THAT THE PHILLIPS' CONDUCT RATIFIED THE MAY 1998 CONTRACT

After an evidentiary hearing on B&V's petition to compel arbitration, the trial court found that the January 1996 Agreement, which contained a clause requiring binding arbitration of disputes, was fully enforceable. Accordingly, the court held that unless the Phillips agreed to arbitration, their conduct would be deemed a ratification of the May 1998 Agreement, which contained an integration clause but not an arbitration clause. (CT* 531-32.) When the Phillips refused to consent to arbitration (CT* 573-79), the trial court denied B&V's petition and subsequently held that the Phillips had ratified the May

1998 Agreement. (CT 468.) The Court of Appeal affirmed. (App. to Pet. at X-XI.)

As a general rule, a plaintiff may pursue inconsistent remedies up until the time of judgment. However, where the plaintiff's pursuit of one of those remedies works a significant prejudice to the defendant (or results in a significant benefit for the plaintiff), the plaintiff is deemed to have elected between his remedies, and is estopped from pursuing the alternative remedy. *E.g., C.J.A. Corp. v. Trans-Acton Financial Corp.*, 86 Cal.App.4th 664, 669-70 (2001); *Smith v. Golden Eagle Insurance Co.*, 69 Cal.App.4th 1371, 1375-76 (1999).

In their petition, the Phillips claim that they complied with the trial court's order and elected arbitration. (Pet. at 12.) Not so. Although the Phillips' "Election" included contemptuous language suggesting that the Court order arbitration as "a futile waste of time and resources" pursuant to the Court's "patently asinine" decision which would "eventually be overturned," the Phillips made it abundantly clear that they were *not* agreeing to arbitration:

> Plaintiffs do not, however, agree to arbitration and do reserve their right to litigate all claims against Defendants . . . The Court should vacate its decision of December 18, 2000, and take no further action in this matter until Judge Flinn either recuses himself or is removed for cause . . . Plaintiffs do not hereby agree to arbitration and will have that arbitration set aside in due course . . . No arbitration can, therefore, be ordered on the agreed [sic] facts in this case.

(CT* 596, 598.)

The Court of Appeal properly applied settled principles of election of remedies here, holding that the Phillips could either agree to arbitration and continue challenging the May 1998 Agreement, or reject arbitration and be deemed to have ratified the May 1998 Agreement, but not both.

IV. THE COURT OF APPEAL PROPERLY HELD THAT THE PHILLIPS' STATEMENTS WERE UNPRIVILEGED, FALSE AND DEFAMATORY

The jury unanimously held David and Carolyn Phillips liable for libel based upon three types of defamatory statements offered in evidence by B&V: statements made in letters (Exhs. 469, 473, 476, 575); in pleadings (Exh. 484); and statements to news reporting agencies (Exh. 493) that resulted in the republication of defamatory statements in a newspaper article (Exh. 482). In these documents, the Phillips repeatedly accuse Richard Bowles and Bowles & Verna of having committed "extortion" and of being "criminals."[3] (*E.g.*, Exh. 469 ("Bowles & Verna is resolute in continuing its pattern of extortion and wrongdoing"); 473 ("As long as your clients persist in their attempts at fraud, extortion, and criminal conspiracy . . . your clients are again up to their old tricks of trying to collect more than they are actually owed through fraud and extortion"); 476 ("caused by Bowles & Verna due to its

[3] Of course, the Phillips' charges are not protected by the First Amendment. "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

fraud, extortion"); 484 ("to protect against B&V's pattern of extortion . . . This tactic, of course, is entirely consistent with B&V's habitual *modus operandi*: extortion . . . B&V are criminals. B&V are extortionists. B&V are a danger to the public").) The Court of Appeal affirmed the judgment, holding that the Phillips' statements were not privileged, and rejecting the Phillips' claims that they were prevented from proving the truth of their statements at trial. (App. to Pet. at XV-XIX.)

The Phillips claim that their statements were protected by California's litigation privilege, and that they were precluded from proving the truth of their statements at trial. (Pet. at 13-23.) The Phillips' claims are frivolous.

A. The Litigation Privilege Does Not Protect Everything a Party Says During Litigation

Five different judges – two trial judges and the three members of the Court of Appeal panel – have concluded that the Phillips' charges of criminal misconduct against Mr. Bowles and Bowles & Verna were outside the litigation privilege. (CT 564 (Judge Kolin); RT 1639-40, 1644-65 (Judge Bruiniers); App. to Pet. at XV-XIX.) That conclusion was plainly correct based upon settled law.

Under California law, the litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. *Silberg v. Anderson*, 50 Cal.3d 205, 212 (1990). As the Court of Appeal observed herein, "the relevancy requirement is real." (App. to Pet. at XVI.) The litigation privilege "does not prop the barn door wide open for any

and every sort of prelitigation charge or innuendo, especially concerning individuals." *Nguyen v. Proton Technology Corp.*, 69 Cal.App.4th 140, 150 (1999).

The "relation" prong means a functional connection; in other words, the communication "must function as a necessary or useful step in the litigation process . . . This is a very different thing from saying that the communication's *content* need only be related in some way to the subject matter of the litigation." *Rothman v. Jackson*, 49 Cal.App.4th 1134, 1146 (1996). The test can be satisfied only where a communication functions "intrinsically, and apart from any consideration of the speaker's intent, to advance a litigant's case." *Id.* at 1148.

This was an action to determine the amount due to B&V under the operative fee agreement. B&V sued on the contract(s); the Phillips made a litany of allegations of misconduct in hopes of avoiding the contracts, throwing in a malpractice claim for the sake of negotiating leverage. The case does not and has never had anything to do with the crimes of extortion, conspiracy, or indeed, criminal conduct of any kind. The Phillips have never demonstrated how their defamatory statements were a "necessary and useful step in the litigation process," or how their communications functioned instrinsically to advance their case, and they make no such showing in the Petition either.

B. The Phillips Were Not Prevented From Attempting to Prove the Truth of Their Defamatory Statements

Nor were the Phillips unfairly precluded from proving the truth of their defamatory statements.

After the trial court reaffirmed the earlier ruling that the Phillips' communications were not privileged, David Phillips informed the judge that the Phillips wished to assert a defense of truth. (RT 1659-60.) The trial court then recited the elements of the crime of extortion, quoting from CALJIC Jury Instruction 14.70, and asked David Phillips what evidence he could introduce to prove those elements. (RT 1663-64.) David was unable to make a sufficient showing, merely repeating his claims that B&V had threatened to sabotage the bad faith litigation and making the bizarre claim that B&V had threatened Carolyn Phillips' life. (RT 1664.) The trial court then properly ruled that "none of the offers you have made would establish, if proven, the requisite elements of the criminal elements of extortion. And so the – Ms. Phillips is not being precluded from establishing the truth of the matter because there is no evidence or offer of evidence made which would establish those elements." (RT 1664-65.)

Despite that ruling, the trial court ultimately permitted Carolyn Phillips to testify that what they really meant by "extortion" was that Mr. Bowles and B&V had "tak[en] total advantage" of the Phillips by "getting them into a position of vulnerability where they can do nothing else and taking advantage." (RT 1860; *see* RT 1854-55, 1858-59.) Indeed, the Phillips alluded to their bogus coercion claims again and again before the jury. (RT 609-10, 617-18, 652-53, 677, 901, 1858-60, 1865, 1869-70, 1879, 2007-08). In flagrant disregard of the court's evidentiary rulings, David and Carolyn Phillips managed on at least two occasions to draw the jury's attention to their coercion claims and suggest that the trial court was hiding the truth from the jury. (RT 1865 "(Carolyn) I meant what I

said. I would love to prove it – but I'm not allowed"); 1879 ("Q. (David) And I can't ask you what that abuse is about – . A. (Carolyn) No, we're not allowed to talk about that.")

The Phillips were not barred from proving the truth of their allegations. The trial court read David the legal elements of extortion, asked him what evidence he could offer to satisfy those elements, and David was unable to make a sufficient offer of proof. The court's ruling, affirmed by the Court of Appeal, was proper and based upon settled California state law.

V. THE PHILLIPS DEMONSTRATE NO BASIS FOR REVIEW WITH RESPECT TO FALSE PROMISE

Next, the Phillips argue that review should be granted with respect to yet another issue of California state law – the validity of the judgment holding David Phillips liable for false promise, since a judgment for false promise cannot be based upon what the Phillips insist was an "extorted" agreement. (Pet. at 24-26.)

The Phillips' argument is frivolous. The Court of Appeal reversed the judgment as to false promise on the grounds that the damages awarded were duplicative. (App. to Pet. at XIX-XX.) Although B&V respectfully believes that the Court of Appeal's decision was incorrect in this respect, the court's action means that there no longer *is* any judgment for false promise, and therefore, there is literally nothing for the Court to review as to this issue.

Even if the false promise judgment had stood, the Phillips' insistence that the May 1998 Agreement was extorted is preposterous. In late 1998, David Phillips described the May 1998 Agreement as follows:

> [T]here is a binding contract. You're bound by it . . . You can't – you can't renegotiate. You're stuck with it. You signed a deal. You're stuck with it. You have to honor it.

(RT 1911.)

Substantial evidence in the record demonstrated that the May 1998 Agreement was not signed under duress. (*Supra* at 7-8.)

VI. BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S FINDING THAT DAVID AND STEPHAN PHILLIPS BREACHED THE MAY 1998 AGREEMENT, THE COURT OF APPEAL PROPERLY AFFIRMED THE AWARD OF FULL CONTRACT DAMAGES TO B&V

Next the Phillips claim that the trial court's award of breach of contract damages to B&V pursuant to the May 1998 Agreement, which was affirmed by the Court of Appeal, conflicts with the California Supreme Court's decision in *Fracasse v. Brent,* 6 Cal.3d 784, 792 (1972). (Pet. at 26-27.)

The Phillips are wrong for at least two reasons: first, *Fracasse* has nothing to do with the proper measure of damages for an attorney when the client has breached the fee agreement; and second, even if calculating damages pursuant to the contract rather than *quantum meruit* was

error – which it was not – the Phillips invited the error and cannot now complain of it.

In *Fracasse*, an attorney was discharged without cause by a client who he was representing based upon a contingent fee contract. There was no breach of contract by the client involved. *Fracasse v. Brent*, 6 Cal.3d at 790 (discharge of attorney is not breach of contract).

The evidence herein, in stark contrast to *Fracasse*, showed that a few days after B&V obtained a seven and one-half million dollar verdict for the Phillips, David repudiated all the fee agreements, telling the attorneys that the Phillips had no obligation to pay B&V anything, and that in his view, all of the fee agreements between the Phillips and B&V were void. (RT 1290-91, 1597, 1621, 1691, 1910.)

The principles applicable to these circumstances are well-settled under California law. When one party repudiates a contract, the other party's further performance is excused, and he may treat the conduct as a total breach. *County of Solano v. Vallejo Redevelopment Agency*, 75 Cal.App.4th 1262, 1275-76 (1999); *Taylor v. Johnston*, 15 Cal.3d 130, 137-38 (1975); Civil Code § 1440. The Phillips' repudiation of the contract entitled B&V to recover damages pursuant to the contract, *not* under *quantum meruit*. *See Franklin v. Appel*, 8 Cal.App.4th 875, 892-93 (1992) (where contingency fee agreement was not voidable, attorney's damages should have been calculated under the contract).

Even if the trial court's failure to calculate damages based upon *quantum meruit* had been error – which it certainly was not – the Phillips would still be unable to rely upon it as a basis for their petition. B&V had a cause

of action for *quantum meruit* recovery in their cross-complaint. The Phillips moved *in limine* to exclude all evidence of *quantum meruit* on the grounds that B&V was proceeding under the May 1998 Agreement, and the trial court granted the motion. (RT 252.) Therefore, any argument that B&V's recovery should have been measured by *quantum meruit* is barred by the doctrine of invited error.

VII. THE COURT OF APPEAL PROPERLY AFFIRMED THE SUMMARY ADJUDICATION OF THE PHILLIPS' CLAIM FOR MALPRACTICE

Finally, the Phillips claim that the trial court's granting of summary adjudication with respect to their malpractice claim, which was affirmed by the Court of Appeal, conflicts with several Court of Appeal decisions which have permitted the recovery of expenses in bad faith actions which do not qualify as "costs" under C.C.P. § 1032. (Pet. Rev. at 27-29.)

The Court of Appeal held that "There is no authority for the Phillipses' claim that *Brandt* permits recovery of all expenses incurred in prosecuting an action to recover policy benefits, even if the expenses fall outside the statutory definition of 'costs' under Code of Civil Procedure section 1032." (App. to Pet. at XXII.)

The cases cited by the Phillips are not to the contrary. *Orrick Herrington & Sutcliffe v. Superior Court*, 107 Cal.App.4th 1052, 1059 (2003) has nothing to do with expenses recoverable in insurance bad faith cases. The holding in *Orrick* was that the plaintiff had failed to show actual damages arising from the allegedly negligent drafting of a marital settlement agreement. The courts in *Jonathan Neil & Assoc., Inc. v. Jones*, 33 Cal.4th 917, 929

(2004), *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal.App.4th 1020, 1045 (2003) and *Marie Y. v. General Star Indemnity Co.*, 110 Cal.App.4th 928, 948 (2003), merely remark in passing that the plaintiffs in each case had recovered costs below without explaining what was recovered and the basis for the recovery. The Phillips fail to offer any reported decision allowing recovery of all expenses under *Brandt*. Thus, the Court of Appeal properly affirmed summary adjudication of the Phillips' malpractice claim.

CONCLUSION

The petition presents no properly preserved issue of Federal law. The purely state law issues raised by petitioners were properly resolved by the California courts based upon substantial evidence in the record and settled principles of law. The petition should be denied.

Respectfully submitted,

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